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34 CFR Part 200

Title I—Improving the Academic Achievement of the Disadvantaged; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 200

RIN 1810–AA91

Title I—Improving the Academic Achievement of the Disadvantaged

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations governing the programs administered under Title I, parts A, C, and D of the Elementary and Secondary Education Act of 1965 (ESEA), as amended (hereinafter referred to as the Title I programs.) These regulations are needed to implement recent changes to Title I of the ESEA made by the No Child Left Behind Act of 2001 (NCLB Act).

DATES: These regulations are effective January 2, 2003.

FOR FURTHER INFORMATION CONTACT: For subparts A, D, and E of part 200, Jacquelyn C. Jackson, Ed. D. Acting Director, Student Achievement and School Accountability Programs, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue, SW., room 3W202, FB–6, Washington, DC 20202–6132. Telephone: (202) 260–0826.

For subparts B and C of part 200, Francisco Garcia, Director, Migrant Education Program, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue, SW., room 3E217, FB–6, Washington, DC 20202–6135. Telephone: (202) 260–0089.

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SUPPLEMENTARY INFORMATION: These regulations implement changes to Title I of the ESEA, as amended by the NCLB Act (Public Law 107–110), enacted January 8, 2002. On August 6, 2002, the Secretary published a notice of proposed rulemaking (NPRM) for these programs in the **Federal Register** (67 FR 50986).

In the preamble to the NPRM, the Secretary discussed on pages 50986 through 51001 the major revisions proposed in that document to implement changes in the provisions of Title I made by the NCLB Act. These included the following:

- Clarifying in § 200.11 that a condition of receiving Title I funds is that, if selected, the local educational agency (LEA) must participate in the National Assessment for Educational Progress (NAEP).
- Specifying in § 200.12 that the implementation of the statutory provisions requiring a single, statewide accountability system take effect beginning with the 2002–2003 school year.
- Requiring in § 200.12 that States include, in their accountability systems, guidelines for identifying the students with disabilities who should take alternate assessments and that States report on the number of students who take an alternate assessment.
- Clarifying in §§ 200.13 through 200.20 statutory provisions in section 1111(b)(2) of the NCLB Act requiring each State to demonstrate what constitutes adequate yearly progress (AYP), particularly the interrelationship among the timeline, starting points, intermediate goals, and annual measurable objectives that are part of AYP.
- Clarifying in § 200.13(c)(1) and (2) that States can define achievement standards for students with the most significant cognitive disabilities who take an alternate assessment, but that the percentage of students with disabilities included in accountability measures using alternate standards cannot be more than .5 percent of all students assessed in a State or LEA.
- Specifying in § 200.16 that a State must set separate starting points for reading/language arts and mathematics, and permitting the establishment of separate starting points by grade span.
- Clarifying in § 200.20 the statutory requirement that 95 percent of the students enrolled in each subgroup must take the State's academic assessment for the school to make AYP.
- Requiring in § 200.21 that the Secretary review both a State's AYP and its annual measurable achievement objectives relating to the English proficiency of limited English proficient students.
- Reorganizing in §§ 200.25 through 200.28 schoolwide program regulations to emphasize the fundamental purpose of a schoolwide program and to create smaller and simpler sections.
- Clarifying in §§ 200.30 and 200.31 the statutory requirement that an LEA conduct an annual review of the performance of all schools receiving funds under subpart A of the ESEA and provide schools with the data on which it has based a proposed identification for improvement, corrective action, or restructuring.
- Clarifying in §§ 200.32 through 200.35 the statutory provisions related to the LEA's identification of schools for improvement, corrective action, and restructuring as well as provisions governing the delay or termination of requirements related to identification.
- Clarifying in §§ 200.36 through 200.38 the manner in which State educational agencies (SEAs), LEAs, and schools must meet notification requirements under section 1116 of the ESEA.
- Restating in §§ 200.39 through 200.41 the statutory requirements related to both LEA and school-level responsibilities under the school improvement process.
- Clarifying in §§ 200.42 and 200.43 the statutory requirements related to corrective action and restructuring.
- Restating and reorganizing in § 200.44 the statutory provisions related to the public school choice option and clarifying the statutory deadline to provide this option.
- Specifying in §§ 200.45 through 200.47 requirements for the provision of supplemental services.
- Clarifying in § 200.48 statutory provisions regarding the reservation of funds to pay for choice-related transportation and supplemental educational services.
- Clarifying in §§ 200.49 through 200.51 statutory provisions related to SEA responsibilities in the school improvement process, including SEA review of LEA progress and notice requirements.
- Including in §§ 200.52 and 200.53 the statutory requirements for LEA improvement and corrective action.
- Incorporating in § 200.54 the statutory provision with respect to State or local laws or collective bargaining agreements in effect on January 8, 2002—the day the NCLB Act was signed into law.
- Incorporating in §§ 200.55 through 200.57 the statutory provisions regarding qualifications of teachers, and clarifying that the requirements apply to teachers of the core academic subjects and do not apply to teachers who do not teach core subjects, employees of third-party contractors, or supplemental services providers.
- Incorporating in §§ 200.58 and 200.59 statutory provisions governing paraprofessionals, clarifying that the term applies to individuals performing instructional support duties and to paraprofessionals in both targeted assistance and schoolwide program

schools supported by funds under subpart A of this part.

• Clarifying in § 200.60 that professional development funds may be used for paraprofessionals as well as teachers.

• Incorporating in §§ 200.61 through 200.66 statutory changes from the previous law governing the participation of eligible children in private schools and clarifying provisions in this area about which questions have arisen in the past.

• Specifying in §§ 200.70 through 200.75 procedures that SEAs must follow in adjusting allocations determined by the Secretary to account for unique situations within their states.

• Clarifying in §§ 200.77 and 200.78 within-district allocation procedures as specified in section 1113 of the ESEA.

• Restating in § 200.79 the criteria a State or local program must meet in order to be excluded from ''supplement not supplant'' and ''comparability'' determinations, and incorporating a change in the poverty threshold for schoolwide programs.

• Clarifying in §§ 200.81 through 200.88 program specific regulations for subpart C—Migrant Education Program (MEP).

• Specifying that the regulations for subpart D—Prevention Programs for Children and Youth Who Are Neglected, Delinquent, or At-risk of Dropping Out have not changed.

• Clarifying in §§ 200.100 through 200.103 new procedures an SEA must follow when reserving funds for school improvement, State administration, and the State academic achievement awards program, addressing the use of funds reserved for State administration, and providing certain definitions that apply to all of the programs governed by the regulations.

The final regulations reflect these provisions, modified as noted in the analysis of comments and changes in the appendix.

Significant Changes From the NPRM

• *AYP Requirements:* Numerous comments were received from states requesting information on potential flexibility in determining AYP. One of the cornerstones of the NCLB is its strong emphasis on accountability for results. Only if we hold schools and LEAs accountability for the improved achievement of *all* students will we meet the goal of leaving no child behind. As a result, the NCLB Act included very specific, rigorous requirements that States must implement to determine the AYP of each public school, LEA, and the State itself. In preparing the final regulations, the Secretary has faithfully implemented the statutory provisions governing AYP, addressing additional flexibility wherever possible. The Secretary realizes that the accountability systems currently in place in many States may not fully meet the statutory and regulatory requirements. To meet the requirements in NCLB and these final regulations, a State may continue to use its current State accountability system, consistent with Secretary's July 24, 2002 *Dear Colleague* letter, if that system integrates AYP, as defined in the statute and regulations, into its system. A State must submit evidence to the Secretary, for peer review, that thoroughly describes the State's accountability system and demonstrates how it has integrated the AYP provisions required by the statute and regulations.

• *AYP for students with the most significant cognitive disabilities:* Section 200.13 of the NPRM would have allowed the use of alternate achievement standards for students with the most significant cognitive disabilities for determining the AYP of states and LEAs, provided that use did not exceed 0.5 percent of all students. Numerous comments were received on this proposal, with many of them indicating that commenters misunderstood this proposal as limiting the number of students with disabilities who could take an alternate assessment, rather than providing flexibility by allowing the use of alternate achievement standards to determine proficiency for calculating AYP for a limited group of students with disabilities. Because the Secretary believes that the policy may need further clarification, the Secretary will be seeking public comment in an NPRM to be published shortly on a proposed policy regarding the appropriate use of alternate achievement standards in determining AYP for students with the most significant cognitive disabilities.

However, because it is critical to ensure that students with disabilities are not excluded from state accountability systems, the final regulations provide that the same grade level academic content and achievement standards that apply to all public schools and public school students in the State will be applied to alternate assessments. The Secretary anticipates that the separate NPRM will propose an exception to this policy for a small group of students with disabilities.

• *Graduation Rates and Other Indicators:* Section 200.19 of the NPRM required States to include in their definition of AYP graduation rates and one other academic indicator for elementary and middle schools. The final regulation clarifies that States are required to use the other indicators to determine whether or not a school or LEA has made AYP.

• *Restructuring:* Section 200.34 of the NPRM did not address school status after implementation of restructuring. The final regulations modify the NPRM by clarifying that a school in restructuring must continue to provide supplemental educational services and choice, and to implement its restructuring plan, until it has made AYP for two consecutive years.

• *School choice and capacity:* Numerous commenters requested clarification of the NPRM on the issue of a school district's capacity to provide choice for all students. Section 200.44(d) of the final regulation clarifies that an LEA may not use lack of capacity to deny an eligible student the opportunity to transfer to another school not identified for improvement.

• *LEA responsibility for supplemental educational services.* Sections 200.46(a)(4) and 200.47(a)(5) of the NPRM did not address the responsibility of LEAs and SEAs to ensure that limited English proficient students receive appropriate educational services and language assistance in the provision of supplemental services. The final regulation clarifies that both the LEA and SEA are required to ensure that students with limited English proficiency receive appropriate supplemental educational services and language assistance in the provision of those services.

• *Providers of supplemental educational services:* Section 200.47(b)(3) of the NPRM stated: ''A private provider may not, on the basis of disability, exclude a qualified student with disabilities or a student covered under Section 504 if the student can, with minor adjustments, be provided supplemental educational services designed to meet the individual educational needs of the student unless otherwise provided by law.'' NPRM provisions §§ 200.46(a)(4) and 200.47(a)(5) provided that LEAs and SEAs must ensure that eligible students with disabilities and students covered by Section 504 receive appropriate supplemental educational services and accommodations in the provision of those services. The final regulation is amended to eliminate the ''minor adjustments'' standard for private providers of supplemental services.

• *Scientifically Based Research and Supplemental Services Providers:* Section 200.47(b)(4)(ii) of the NPRM prohibited states from requiring

providers to demonstrate that their instructional strategies were based on scientifically based research as a condition of approval. The final regulation removes this restriction.

• *Alternate Certification:* The NPRM specified that one of the requirements of being a ''highly qualified teacher'' is having obtained full State certification as a teacher—which may include certification obtained through alternative routes to certification. The final regulation adds language that requires teachers who are enrolled in alternative route programs to receive high-quality professional development before and while teaching, to participate in a program of intensive supervision or a teacher mentoring program, to assume the functions of a teacher while in the alternative route program only for a specified period of time not to exceed three years, and to demonstrate satisfactory progress toward full certification as prescribed by the State. The regulations have been further amended by requiring the State to ensure, through its certification and licensure process, that these provisions are met.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, approximately 140 parties submitted comments. An analysis of the comments and of the changes in the regulations since publication of the NPRM is published as an appendix at the end of these final regulations.

We group major issues according to subject. We discuss other substantive issues under the sections of these regulations to which they pertain. Generally, we do not address regulatory provisions that are technical or otherwise minor in effect.

Waiver of Rulemaking

In response to comments, the Secretary has added § 200.61 in these final regulations regarding parents' right to know the qualifications of their child's teachers. This section merely incorporates statutory requirements in section 1111(h)(6) of Title I. The Secretary has included it, however, to emphasize the important responsibility of LEAs to notify parents of students in Title I schools that they have a right to request information regarding the professional qualifications of their child's teachers. Under the Administrative Procedure Act (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed regulations. However, these regulations merely reflect statutory provisions and do not establish or affect substantive policy. Therefore, under 5 U.S.C. 553(b)(B), the Secretary has determined that proposed regulations are unnecessary.

Executive Order 12866

We have reviewed these final regulations in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements, and those we have determined to be necessary for administering this program effectively and efficiently. Based on our assessment of the regulatory burden on States, LEAs, and schools, we estimate that the total cost of administering these regulations is $52 million. In deriving this cost estimate, we calculated the burden hours at the SEA level to be 55,952 hours. Using a cost rate of $25 per hour at the SEA level, we estimated the administrative burden cost to States to be $1.4 million. At the LEA and school levels, we calculated the burden hours to be 2,530,476 hours. Based on a cost rate of $20 per hour, the estimated administrative burden cost at the local level is $50.6 million. The section of this preamble on the Paperwork Reduction Act of 1995 discusses the burden that the statutory requirements of the NCLB Act impose on States, LEAs, and schools in more detail. The fiscal year (FY) 2002 appropriation for Title I, part A provided a $1.6 billion (18 percent) increase in funds. This increase in funding will enable States, LEAs, and schools to meet the administrative costs associated with the requirements of the NCLB Act at the State, LEA, and school levels.

In assessing the potential costs of implementing these regulations compared to the $10.6 billion in Title I, Part A, Part C, and Part D, subpart 1 funds received by the States and LEAs, we have determined that the benefits of the regulations justify the costs. The FY 2002 appropriation of $10.6 billion for these programs, which represents an 18 percent increase over the prior year appropriation, will provide enough resources for States, LEAs, and schools to carry out the requirements of the statute. The NCLB Act represents a sweeping overhaul of Federal efforts to support elementary and secondary education in the United States and is a landmark in education reform designed to improve student achievement and change the culture of our nation's schools. The new law is based on four basic principles—stronger accountability for results; greater flexibility for States, school districts, and schools in the use of Federal funds; more choices for parents of children from disadvantaged backgrounds; and an emphasis on teaching methods that have been demonstrated to work.

We have also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Most of the final regulations would add clarity where the statute is ambiguous or unclear or would reorganize statutory provisions to facilitate a better understanding of their requirements. These regulations would not add significantly to the costs of implementing the Title I programs authorized by the Elementary and Secondary Education Act (ESEA) or alter the benefits that the Secretary believes will be obtained through successful implementation. The vast majority of the implementation costs and benefits will stem from the underlying legislation.

The programs authorized by Title I of the ESEA, as reauthorized by the No Child Left Behind Act of 2001, have as their goal the education of all students, including students who are economically disadvantaged, limited English proficient, disabled, migratory, residing in institutions for neglected or delinquent youth and adults, or members of other groups typically considered ''at risk,'' so that they can achieve to challenging content and academic achievement standards. Thus, the benefits that will be obtained through the reauthorized Title I and its implementing regulations are those primarily of a more educated society. National data sets and studies by prominent researchers have demonstrated repeatedly that better education has major benefits, both economic and non-economic, not only for the individuals who receive it but for society as a whole. Nations that invest in quality education enjoy higher levels of growth and productivity, and a high-quality education system is an indispensable element of a strong economy and successful civil society.

Data from the 1999 Current Population Survey, conducted by the Census Bureau, indicate that adults with a high school diploma (but no further education) had a median income of $23,061, compared to $17,015 for those with no diploma and $15,098 for those with less than 9 years of education. High school graduates are more likely to continue their education and receive the additional skills and knowledge necessary to compete for jobs in a high-technology, knowledge-driven economy.

Scholars have also found strong, positive correlations between higher levels of schooling and higher lifetime earnings, higher savings rates, and reduced costs of job search.

Researchers have, in addition, found that more and better education correlates with other outcomes that, while not directly related to employment and earnings, have a major, positive benefit on society. More educated individuals lead healthier lives and have lower mortality rates. They are more likely to donate time and money to charity, and to vote in elections. Researchers have demonstrated the intergenerational impact of education, as the educational level of parents is a positive predictor of children's health, cognitive development, education, occupational status, and future earnings. In addition, education is negatively correlated with criminal activity and incarceration, and more educated mothers are less likely to have daughters who give birth out of wedlock as teens.

The reauthorized Title I programs, and the final regulations for those programs, will also lead to improvements in the qualifications of teachers, both in programs supported by Title I and in schools generally. The Department believes that the new teacher qualifications provisions will also convey major benefits on students and on society generally. Research has found that the academic success of children is more dependent on teacher quality than on any other variable, with the exception of family background; it is, in other words, the most important school-related determinant of achievement.

The major costs to States and to LEAs imposed by the statute and the regulations are the costs of administering the Title I programs: At the State level, distributing funds to LEAs, monitoring LEA activities, providing technical assistance, and carrying out other activities specified in the statute, and, at the local level, administering programs in schools and classrooms, providing professional development to teachers and other staff, and ensuring program accountability, among other things. The Department believes that these activities will be financed through the appropriations for Title I and other Federal programs and that the responsibilities encompassed in the law and regulations will not impose a financial burden that States and LEAs will have to meet from non-Federal resources. For purposes of the Unfunded Mandates Reform Act of 1995, these regulations do not include a Federal mandate that might result in increased expenditures by State, local, and tribal governments, or increased expenditures by the private sector of more than $100 million in any one year.

Regulatory Flexibility Act

This Final Regulatory Flexibility Analysis (FRFA) has been prepared in accordance with the Regulatory Flexibility Act. It involves final regulations under Title I of the ESEA, as amended by the NCLB Act. Its provisions require LEAs, without regard to size, to take certain actions to improve student academic achievement.

1. Need for, Objectives of, and Legal Basis for Final Regulations

The purpose of the final regulations is to implement recent changes to Title I of the ESEA made by the NCLB Act. We are issuing final regulation under the authority in section 1901(a) of Title I.

2. Summary of Significant Issues Raised in Response to the Initial Regulatory Flexibility Analysis (IRFA)

We have received no comments concerning the cost implications of these regulations on small entities as result of our request for comments to the IRFA published in the NPRM on August 6, 2002. However, there was one comment on the proposed regulation regarding the impact of particular provisions on small LEAs.

Comment: One commenter recommended that the final regulations provide flexibility in defining AYP for small school districts, and single-school LEAs in particular, that may find it difficult to implement the subgroup-based accountability requirements of the Act.

Discussion: The intent of the law is to ensure that all schools and districts are held accountable for student achievement. In those instances where schools and districts are too small to include any subgroups, the school and district will need to make a decision about AYP at least on the basis of all its students who were within the school or district for a full academic year. The Department of Education will issue nonregulatory guidance to advise States about particular methodologies for handling this issue. The regulations clarify at § 200.7(d) that subgroups too small to be reported or identified at one level must be included at the next higher level, assuming the subgroup reaches the appropriate size.

3. A Description of the Small Entities to Which These Regulations Will Apply

The small entities that would be affected by these final regulations are small LEAs receiving Federal funds under Title I programs. Based on the Small Business Administration's (SBA) standards, which defines ''small entities'' as those jurisdictions serving a population of less than 50,000, 13,231 LEAs out of a total of 13,335 LEAs that receive Title I, part A funds would be considered small. As noted earlier, the FY 2002 appropriation provides a $1.6 billion increase in the Title I, part A amount available for school year 2002–03 to States and to all LEAs, both large and small.

4. Reporting, Recordkeeping and Other Compliance Requirements

Under these regulations, an LEA must: (1) Publicize and disseminate the results of its annual progress review, (2) notify parents and teachers of any school identified for improvement or subject to corrective action or restructuring, (3) publicize and disseminate information regarding any action taken by the school and LEA to address the problems that led to the identification, and (4) for schools subject to restructuring, prepare a plan to carry out alternative governance arrangements. An LEA also must maintain in its records, and provide to the SEA, a written affirmation, signed by officials of each private school with participating children or appropriate private school representatives, that the required consultation has occurred. The potential costs and benefits of associated with these regulations are discussed in the section on Executive Order 12866.

5. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. Although the NCLB Act makes no special provisions for ''small'' LEAs that serve fewer than 50,000 students, which account for 99 percent of all school districts receiving Title I part A funds, the Department has, to the extent allowable under the statute accommodated small LEAs in these regulations. For example, § 200.74 of the regulations outlines procedures a State must use in using alternative poverty data, which it believes better reflect where poor children are located, to determine final Title I allocations for LEAs with a total population of less than 20,000. This provision potentially applies to roughly 80 percent of all LEAs nationally that meet this criteria. LEAs with fewer than 1,000 students enrolled are exempt from the within-district allocation requirements outlined

in § 200.78. More than 4,060 LEAs receiving Title I Part A funds are affected by this policy. Moreover, activities required under these regulations would be financed through the appropriations for Title I programs, which have increased by $1.6 billion for FY 2002, and the responsibilities encompassed in the law and regulations would not impose a financial burden that small entities would have to meet from non-Federal resources.

Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 does not require you to respond to a collection of information unless it displays a valid Office of Management and Budget (OMB) control number. We display the valid OMB control numbers assigned to the collections of information in these final regulations at the end of the affected sections of the regulations.

Title I, part A of the Elementary and Secondary Education, as amended by the No Child Left Behind Act, contains several provisions that require SEAs, LEAs, or schools to collect or disseminate information. They are: Sections 200.26, 200.27, 200.28, 200.30, 200.31, 200.34, 200.36, 200.37, 200.38, 200.39, 200.41, 200.42, 200.43, 200.45, 200.46, 200.47, 200.49, 200.50, 200.51, 200.52, 200.57, 200.61, and 200.62. Section 200.61 was added to the final regulation to incorporate statutory language requiring LEAs to notify parents that they may request information about the professional qualifications of their child's classroom teacher. All these sections relate to OMB control number 1810–0581. Sections 200.12, 200.13, and 200.33 are covered under OMB control number 1810–0576. Section 200.53 is covered under OMB control number 1810–0516. Sections 200.70 through 200.75 and 200.100 are covered under OMB control numbers 1810–0620 and 1810–0622. Section 200.83, 200.84, and 200.88 are covered under OMB control number 1810–0659. Section 200.91 is covered under OMB control number 1810–0060.

SEAs must: (1) Provide annual notice to potential supplemental service providers of the opportunity to provide such services, (2) maintain an updated list of approved providers from which parents may select, and (3) publicly report on standards and techniques for monitoring the quality and effectiveness of the services offered by each approved provider and for withdrawing approval from a provider that fails, for two consecutive years, to contribute to increasing the academic proficiency of students receiving supplemental services. As part of their responsibility to annually review the progress of each LEA to determine whether schools are making AYP, SEAs must: (1) Provide, before the beginning of the next school year, the results of academic assessments administered as part of the State assessment system in a given school year to LEAs, (2) publicize and disseminate the results of the State review, (3) notify parents when LEAs are identified for improvement or corrective action, including providing information on the corrective action, and (4) notify the Secretary of Education of major factors that have significantly affected student academic achievement in schools identified for improvement. Additionally, under Title I, part D, States must submit a count of children and youth under the age of 21 enrolled in a regular program of instruction operated or supported by State agencies in institutions or community day programs for neglected children and youth and adult correctional institutions.

As part of their responsibility to annually review the progress of schools to determine whether they are making AYP, each LEA must (1) publicize and disseminate the results of its annual progress review, (2) notify parents and teachers of any school identified for improvement or subject to corrective action or restructuring, (3) publicize and disseminate information regarding any action taken by the school and LEA to address the problems that lead to the identification, and (4) for schools subject to restructuring, prepare a plan to carry out alternative governance arrangements. LEAs also must maintain in their records, and provide to the SEA, written affirmation signed by officials of each private school with participating children, or appropriate private school representatives, that the required consultation has occurred.

At the school level, an eligible school choosing to operate a schoolwide program must develop a comprehensive schoolwide plan and maintain records demonstrating that it addresses the intent and purpose of each Federal program included.

The total estimated burden hours for SEA activities covered by the paperwork requirements are 55,952 across 52 SEAs. The total estimated burden hours for LEA activities covered by the paperwork requirements are 1,119,500 hours across 13,335 LEAs. The total estimated burden hours for school-level activities is 1,410,976 hours. Almost all the burden hours at the LEA and school level result from statutory requirements that require: (1) LEAs to prepare restructuring plans for schools that do not make AYP after one full year in corrective action, and (2) schools seeking to operate schoolwide programs to develop schoolwide program plans. The actual impact on an individual LEA or school will vary depending on whether the LEA or school is subject to these specific requirements. The estimate of the burden hours at the LEA level includes an estimate of additional hours that result from adding a new § 200.61 to the final regulations, which requires an LEA to notify parents that they can request information about the professional qualifications of their child's classroom teacher.

Section 200.83 outlines an SEA's responsibility to implement its State Title I, part C (Migrant Education) program through a comprehensive needs assessment and a comprehensive State plan for service delivery. Section 200.84 outlines an SEA's responsibility for evaluating the effectiveness of its Title I, part C (Migrant Education) program. The yearly estimated public reporting burden for the collection of information to implement these two regulatory requirements is 19,925 hours. The Department requested that the Office of Management and Budget (OMB)review the information collections, 1810–0581 and 1810–0659, on an emergency basis. Although these information collections have been approved on an emergency basis, we continue to invite your comments through January 31, 2003. We request those wishing to comment to send their comments to the individual identified in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) establishes requirements for Federal agencies to assess the effect of their regulatory actions on State, local and tribal government and the private sector. These regulations contain no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector. As noted in the cost/benefit analysis, the fiscal year 2002 appropriation for Title I, part A provided a $1.6 billion (18 percent) increase in funds for States to use in implementing the changes mandated by the NCLB Act. Therefore, these regulations are not subject to the requirements of sections 202 and 205 of UMRA.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the

development of regulatory policies that have federalism implications. ''Federalism implications'' means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Although we did not believe our NPRM would have federalism implications, we encouraged State and local elected officials to review the NPRM for federalism implications and to provide comments. We did not receive any comments on federalism implications. We also consulted extensively with Chief State School Officers, other State representatives, Superintendents, and leaders of various education organizations. In May of 2002, we hosted a series of regional meetings to share important information about the proposed regulations during the public comment period. We also conducted numerous teleconferences with State Chiefs and their staff to learn more about the implications of these regulations.

These regulations implement various statutory changes to Title I of the ESEA made by the NCLB Act. We do not believe that these regulations have federalism implications as defined in Executive Order 13132 or that they preempt State law. Accordingly, the Secretary has determined that these regulations do not contain policies that have federalism implications.

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(Catalog of Federal Domestic Assistance Numbers: 84.010 Improving Programs Operated by Local Educational Agencies, 84.011 Education of Migrant Children, 84.013, Prevention and Intervention Programs for Children and Youth Who Are Neglected, Delinquent, or At-Risk of Dropping Out, 84.214A Even Start—Migrant Education)

List of Subjects in 34 CFR Part 200

Administrative practice and procedure, Adult education, Children, Coordination, Education of children with disabilities, Education of disadvantaged children, Elementary and secondary education, Eligibility, Family, Family-centered education, Grant programs-education, Indians education, Institutions of higher education, Interstate coordination, Intrastate coordination, Juvenile delinquency, Local educational agencies, Migratory children, Migratory workers, Neglected, Nonprofit private agencies, Private schools, Public agencies, Reporting and recordkeeping requirements, State-administered programs, State educational agencies, Subgrants.

Dated: November 25, 2002.

Rod Paige,

Secretary of Education.

The Secretary amends part 200 of title 34 of the Code of Federal Regulations as follows:

PART 200—TITLE I—IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

1–2. The authority citation for part 200 is revised to read as follows:

Authority: 20 U.S.C. 6301 through 6578, unless otherwise noted.

Subpart A—Improving Basic Programs Operated by Local Educational Agencies

3. In § 200.6, revise paragraph (a)(2) to read as follows:

§ 200.6 Inclusion of all students.

(a) * * *

(2) *Alternate assessments.* (i) The State's academic assessment system must provide for one or more alternate assessments for a child with a disability as defined under section 602(3) of the Individuals with Disabilities Education Act (IDEA) whom the child's IEP team determines cannot participate in all or part of the State assessments under paragraph (a)(1) of this section, even with appropriate accommodations.

(ii) Alternate assessments must yield results for the grade in which the student is enrolled in at least reading/language arts, mathematics, and, beginning in the 2007–2008 school year, science.

* * * * *

4. In § 200.7, add new paragraphs (c) and (d) to read as follows:

§ 200.7 Disaggregation of data.

* * * * *

(c) *Inclusion of subgroups in assessments.* If a subgroup under § 200.2(b)(10) is not of sufficient size to produce statistically reliable results, the State must still include students in that subgroup in its State assessments under § 200.2.

(d) *Disaggregation at the LEA and State.* If the number of students in a subgroup is not statistically reliable at the school level, the State must include those students in disaggregations at each level for which the number of students is statistically reliable—*e.g.*, the LEA or State level.

5. In subpart A to part 200, remove the undesignated center headings ''Participation of Eligible Children in Private Schools'', ''Capital Expenses'', ''Schoolwide Programs'', Procedures for the Within-State Allocation of LEA Program Funds'', and ''Procedures for the Within-District Allocation of LEA Program Funds''.

6. Add a new undesignated center heading to subpart A of part 200 and place it after § 200.10 to read as follows:

Participation in National Assessment of Educational Progress (NAEP)

7. Revise § 200.11 and place it under the new undesignated center heading ''Participation in National Assessment of Educational Progress (NAEP)'' in subpart A of part 200 to read as follows:

§ 200.11 Participation in NAEP.

(a) *State participation.* Beginning in the 2002–2003 school year, each State that receives funds under subpart A of this part must participate in biennial State academic assessments of fourth and eighth grade reading and mathematics under the State National Assessment of Educational Progress (NAEP), if the Department pays the costs of administering those assessments.

(b) *Local participation.* In accordance with section 1112(b)(1)(F) of the Elementary and Secondary Education Act of 1965 (ESEA), and notwithstanding section 411(d)(1) of the National Education Statistics Act of 1994, an LEA that receives funds under subpart A of this part must participate, if selected, in the State-NAEP assessments referred to in paragraph (a) of this section.

(Authority: 20 U.S.C. 6311(c)(2); 6312(b)(1)(F), 9010(d)(1))

8. Add a new undesignated center heading to subpart A of part 200 and place it after revised § 200.11 to read as follows:

State Accountability System

9. Revise § 200.12 and place it under the new undesignated center heading ''State Accountability System'' in subpart A of part 200 to read as follows:

§ 200.12 Single State accountability system.

(a)(1) Each State must demonstrate in its State plan that the State has developed and is implementing, beginning with the 2002–2003 school year, a single, statewide accountability system.

(2) The State's accountability system must be effective in ensuring that all public elementary and secondary schools and LEAs in the State make adequate yearly progress (AYP) as defined in §§ 200.13 through 200.20.

(b) The State's accountability system must—

(1) Be based on the State's academic standards under § 200.1, academic assessments under § 200.2, and other academic indicators under § 200.19;

(2) Take into account the achievement of all public elementary and secondary school students;

(3) Be the same accountability system the State uses for all public elementary and secondary schools and all LEAs in the State; and

(4) Include sanctions and rewards that the State will use to hold public elementary and secondary schools and LEAs accountable for student achievement and for making AYP, except that the State is not required to subject schools and LEAs not participating under subpart A of this part to the requirements of section 1116 of the ESEA. (Approved by the Office of Management and Budget under control number 1810–0576)

(Authority: 20 U.S.C. 6311(b)(2)(A))

10. Add a new undesignated center heading to subpart A of part 200 and place it after revised § 200.12 to read as follows:

Adequate Yearly Progress (AYP)

11. Revise §§ 200.13 through 200.18 and place them under the new undesignated center heading ''Adequate Yearly Progress (AYP)'' in subpart A of part 200 to read as follows:

§ 200.13 Adequate yearly progress in general.

(a) Each State must demonstrate in its State plan what constitutes AYP of the State and of all public schools and LEAs in the State—

(1) Toward enabling all public school students to meet the State's student academic achievement standards; while

(2) Working toward the goal of narrowing the achievement gaps in the State, its LEAs, and its public schools.

(b) A State must define, in accordance with §§ 200.14 through 200.20, in a manner that—

(1) Applies the same high standards of academic achievement to all public school students in the State;

(2) Is statistically valid and reliable;

(3) Results in continuous and substantial academic improvement for all students;

(4) Measures the progress of all public schools, LEAs, and the State based primarily on the State's academic assessment system under § 200.2;

(5) Measures progress separately for reading/language arts and for mathematics;

(6) Is the same for all public schools and LEAs in the State; and

(7) Consistent with § 200.7, applies the same annual measurable objectives under § 200.18 separately to each of the following:

(i) All public school students.

(ii) Students in each of the following subgroups:

(A) Economically disadvantaged students.

(B) Students from major racial and ethnic groups.

(C) Students with disabilities, as defined in section 9101(5) of the ESEA.

(D) Students with limited English proficiency, as defined in section 9101(25) of the ESEA.

(c) The State must establish a way to hold accountable schools in which no grade level is assessed under the State's academic assessment system (*e.g.*, K–2 schools), although the State is not required to administer a formal assessment to meet this requirement.

(Approved by the Office of Management and Budget under control number 1810–0576)

(Authority: 20 U.S.C. 6311(b)(2))

§ 200.14 Components of Adequate Yearly Progress.

A State's definition of AYP must include all of the following:

(a) A timeline in accordance with § 200.15.

(b) Starting points in accordance with § 200.16.

(c) Intermediate goals in accordance with § 200.17.

(d) Annual measurable objectives in accordance with § 200.18.

(e) Other academic indicators in accordance with § 200.19.

(Authority: 20 U.S.C. 6311(b)(2))

§ 200.15 Timeline.

(a) Each State must establish a timeline for making AYP that ensures that, not later than the 2013–2014 school year, all students in each group described in § 200.13(b)(7) will meet or exceed the State's proficient level of academic achievement.

(b) Notwithstanding subsequent changes a State may make to its academic assessment system or its definition of AYP under §§ 200.13 through 200.20, the State may not extend its timeline for all students to reach proficiency beyond the 2013–2014 school year.

(Authority: 20 U.S.C. 6311(b)(2))

§ 200.16 Starting points.

(a) Using data from the 2001–2002 school year, each State must establish starting points in reading/language arts and in mathematics for measuring the percentage of students meeting or exceeding the State's proficient level of academic achievement.

(b) Each starting point must be based, at a minimum, on the higher of the following percentages of students at the proficient level:

(1) The percentage in the State of proficient students in the lowest-achieving subgroup of students under § 200.13(b)(7)(ii).

(2) The percentage of proficient students in the school that represents 20 percent of the State's total enrollment among all schools ranked by the percentage of students at the proficient level. The State must determine this percentage as follows:

(i) Rank each school in the State according to the percentage of proficient students in the school.

(ii) Determine 20 percent of the total enrollment in all schools in the State.

(iii) Beginning with the lowest-ranked school, add the number of students enrolled in each school until reaching the school that represents 20 percent of the State's total enrollment among all schools.

(iv) Identify the percentage of proficient students in the school identified in paragraph (iii).

(c)(1) Except as permitted under paragraph (c)(2) of this section, each starting point must be the same throughout the State for each school, each LEA, and each group of students under § 200.13(b)(7).

(2) A State may use the procedures under paragraph (b) of this section to establish separate starting points by grade span.

(Authority: 20 U.S.C. 6311(b)(2))

§ 200.17 Intermediate goals.

Each State must establish intermediate goals that increase in equal

increments over the period covered by the timeline under § 200.15 as follows:

(a) The first incremental increase must take effect not later than the 2004–2005 school year.

(b) Each following incremental increase must occur in not more than three years.

(Authority: 20 U.S.C. 6311(b)(2))

§ 200.18 Annual measurable objectives.

(a) Each State must establish annual measurable objectives that—

(1) Identify for each year a minimum percentage of students that must meet or exceed the proficient level of academic achievement on the State's academic assessments; and

(2) Ensure that all students meet or exceed the State's proficient level of academic achievement within the timeline under § 200.15.

(b) The State's annual measurable objectives—

(1) Must be the same throughout the State for each school, each LEA, and each group of students under § 200.13(b)(7); and

(2) May be the same for more than one year, consistent with the State's intermediate goals under § 200.17.

(Authority: 20 U.S.C. 6311(b)(2))

12. Add § 200.19 and place it under the new undesignated center heading ''Adequate Yearly Progress (AYP)'' in subpart A of part 200 to read as follows:

§ 200.19 Other academic indicators.

(a) Each State must use the following other academic indicators to determine AYP:

(1) *High schools.* (i) The graduation rate for public high schools, which means—

(A) The percentage of students, measured from the beginning of high school, who graduate from high school with a regular diploma (not including an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or a GED) in the standard number of years; or

(B) Another definition, developed by the State and approved by the Secretary in the State plan, that more accurately measures the rate of students who graduate from high school with a regular diploma as defined in paragraph (a)(1)(i)(A) of this section.

(ii) In defining graduation rate, the State must avoid counting a dropout as a transfer.

(2) *Elementary and middle schools.* At least one academic indicator for public elementary schools and at least one academic indicator for public middle schools, such as those under paragraph (b) of this section.

(b) The State may include additional academic indicators determined by the State, including, but not limited to, the following:

(1) Additional State or locally administered assessments not included in the State assessment system under § 200.2.

(2) Grade-to-grade retention rates.

(3) Attendance rates.

(4) Percentages of students completing gifted and talented, advanced placement, and college preparatory courses.

(c) A State must ensure that its other academic indicators are—

(1) Valid and reliable;

(2) Consistent with relevant, nationally recognized professional and technical standards, if any; and

(3) Consistent throughout the State within each grade span.

(d)(1) A State may, but is not required to, increase the goals of its other academic indicators over the course of the timeline under § 200.15.

(2) The State—

(i) Must disaggregate its other academic indicators by each group in § 200.13(b)(7) for purposes of § 200.20(b)(2) and section 1111(h) of the ESEA; but

(ii) Need not disaggregate those indicators for determining AYP except as required under section 1111(b)(2)(C)(vii) of the ESEA.

(e) Except as provided in § 200.20(b)(2), a State—

(1) May not use the indicators in paragraphs (a) and (b) of this section to reduce the number, or change the identity, of schools that would otherwise be subject to school improvement, corrective action, or restructuring if those indicators were not used; but

(2) May use the indicators to identify additional schools for school improvement, corrective action, or restructuring.

(Authority: 20 U.S.C. 6311(b)(2), (h))

13. Revise §§ 200.20 and 200.21 and place them under the new undesignated center heading ''Adequate Yearly Progress (AYP)'' in subpart A of part 200 to read as follows:

§ 200.20 Making adequate yearly progress.

A school or LEA makes AYP if it complies with paragraph (c) and with either paragraph (a) or (b) of this section separately in reading/language arts and in mathematics.

(a)(1) A school or LEA makes AYP if—

(i) Each group of students under § 200.13(b)(7) meets or exceeds the State's annual measurable objectives under § 200.18; and

(ii) The school or LEA, respectively, meets or exceeds the State's other academic indicators under § 200.19.

(2) For a group under § 200.13(b)(7) to be included in the determination of AYP for a school or LEA, the number of students in the group must be sufficient to yield statistically reliable information under § 200.7(a).

(b) If students in any group under § 200.13(b)(7) in a school or LEA do not meet the State's annual measurable objectives under § 200.18, the school or LEA makes AYP if—

(1) The percentage of students in that group below the State's proficient achievement level decreased by at least 10 percent from the preceding year; and

(2) That group made progress on one or more of the State's academic indicators under § 200.19 or the LEA's academic indicators under § 200.30(c).

(c)(1) A school or LEA makes AYP if—

(i) Not less than 95 percent of the students enrolled in each group under § 200.13(b)(7) takes the State assessments under § 200.2; and

(ii) The group is of sufficient size to produce statistically reliable results under § 200.7(a).

(2) The requirement in paragraph (c)(1) of this section does not authorize a State, LEA, or school to systematically exclude 5 percent of the students in any group under § 200.13(b)(7).

(3) If a student takes the State assessments for a particular subject or grade level more than once, the State must use the student's results from the first administration to determine AYP.

(d) For the purpose of determining whether a school or LEA has made AYP, a State may establish a uniform procedure for averaging data that includes one or more of the following:

(1) *Averaging data across school years.* (i) A State may average data from the school year for which the determination is made with data from one or two school years immediately preceding that school year.

(ii) If a State averages data across school years, the State must—

(A) Implement, on schedule, the assessments in reading/language arts and mathematics in grades 3 through 8 and once in grades 10 through 12 required under § 200.5(a)(2);

(B) Report data resulting from the assessments under § 200.5(a)(2);

(C) Determine AYP under §§ 200.13 through 200.20, although the State may base that determination on data only from the reading/language arts and mathematics assessments in the three grade spans required under § 200.5(a)(1); and

(D) Implement the requirements in section 1116 of the ESEA.

(iii) A State that averages data across years must determine AYP on the basis of the assessments under § 200.5(a)(2) as soon as it has data from two or three years to average. Until that time, the State may use data from the reading/language arts and mathematics assessments required under § 200.5(a)(1) to determine adequate yearly progress.

(2) *Combining data across grades.* Within each subject area and subgroup, the State may combine data across grades in a school or LEA.

(e)(1) In determining the AYP of an LEA, a State must include all students who were enrolled in schools in the LEA for a full academic year, as defined by the State.

(2) In determining the AYP of a school, the State may not include students who were not enrolled in that school for a full academic year, as defined by the State.

(Authority: 20 U.S.C. 6311(b)(2), (b)(3)(C)(xi))

§ 200.21 Adequate yearly progress of a State.

For each State that receives funds under subpart A of this part and under subpart 1 of part A of Title III of the ESEA, the Secretary must, beginning with the 2004–2005 school year, annually review whether the State has—

(a)(1) Made AYP as defined by the State in accordance with §§ 200.13 through 200.20 for each group of students in § 200.13(b)(7); and

(2) Met its annual measurable achievement objectives under section 3122(a) of the ESEA relating to the development and attainment of English proficiency by limited English proficient students.

(b) A State must include all students who were enrolled in schools in the State for a full academic year in reporting on the yearly progress of the State.

(Authority: 20 U.S.C. 7325)

14. Remove and reserve §§ 200.22 through 200.24 and place them under the new undesignated center heading ''Adequate Yearly Progress (AYP)'' in subpart A of part 200.

15. Add a new undesignated center heading to subpart A of part 200 and place it after § 200.24 to read as follows:

Schoolwide Programs

16. Revise § 200.25 and place it under the undesignated center heading ''Schoolwide Programs'' in subpart A of part 200 to read as follows:

§ 200.25 Schoolwide programs in general.

(a) *Purpose.* (1) The purpose of a schoolwide program is to improve academic achievement throughout a school so that all students, particularly the lowest-achieving students, demonstrate proficiency related to the State's academic standards under § 200.1.

(2) The improved achievement is to result from improving the entire educational program of the school.

(b) *Eligibility.* (1) A school may operate a schoolwide program if—

(i) The school's LEA determines that the school serves an eligible attendance area or is a participating school under section 1113 of the ESEA; and

(ii) For the initial year of the schoolwide program—

(A) The school serves a school attendance area in which not less than 40 percent of the children are from low-income families; or

(B) Not less than 40 percent of the children enrolled in the school are from low-income families.

(2) In determining the percentage of children from low-income families under paragraph (b)(1)(ii) of this section, the LEA may use a measure of poverty that is different from the measure or measures of poverty used by the LEA to identify and rank school attendance areas for eligibility and participation under subpart A of this part.

(c) *Participating students and services.* A school operating a schoolwide program is not required to—

(1) Identify particular children as eligible to participate; or

(2) As required under section 1120A(b) of the ESEA, provide services that supplement, and do not supplant, the services participating children would otherwise receive if they were not participating in a program under subpart A of this part.

(d) Supplemental funds. A school operating a schoolwide program must use funds available under subpart A of this part and under any other Federal program included under paragraph (e) of this section and § 200.29 only to supplement the total amount of funds that would, in the absence of the Federal funds, be made available from non-Federal sources for that school, including funds needed to provide services that are required by law for children with disabilities and children with limited English proficiency.

(e) *Consolidation of funds.* An eligible school may, consistent with § 200.29, consolidate and use funds or services under subpart A of this part, together with other Federal, State, and local funds that the school receives, to operate a schoolwide program in accordance with §§ 200.25 through 200.29.

(f) *Prekindergarten program.* A school operating a schoolwide program may use funds made available under subpart A of this part to establish or enhance prekindergarten programs for children below the age of 6, such as Even Start programs or Early Reading First programs.

(Authority: 20 U.S.C. 6314)

17. Add a new § 200.26 and place it under the undesignated center heading ''Schoolwide Programs'' in subpart A of part 200 to read as follows:

§ 200.26 Core elements of a schoolwide program.

(a) *Comprehensive needs assessment.* (1) A school operating a schoolwide program must conduct a comprehensive needs assessment of the entire school that—

(i) Is based on academic achievement information about all students in the school, including all groups under § 200.13(b)(7) and migratory children as defined in section 1309(2) of the ESEA, relative to the State's academic standards under § 200.1 to—

(A) Help the school understand the subjects and skills for which teaching and learning need to be improved; and

(B) Identify the specific academic needs of students and groups of students who are not yet achieving the State's academic standards; and

(ii) Assesses the needs of the school relative to each of the components of the schoolwide program under § 200.28.

(2) The comprehensive needs assessment must be developed with the participation of individuals who will carry out the schoolwide program plan.

(3) The school must document how it conducted the needs assessment, the results it obtained, and the conclusions it drew from those results.

(b) *Comprehensive plan.* Using data from the comprehensive needs assessment under paragraph (a) of this section, a school that wishes to operate a schoolwide program must develop a comprehensive plan, in accordance with § 200.27, that describes how the school will improve academic achievement throughout the school, but particularly for those students furthest away from demonstrating proficiency, so that all students demonstrate at least proficiency on the State's academic standards.

(c) *Evaluation.* A school operating a schoolwide program must—

(1) Annually evaluate the implementation of, and results achieved by, the schoolwide program, using data from the State's annual assessments and other indicators of academic achievement;

(2) Determine whether the schoolwide program has been effective in increasing the achievement of students in meeting the State's academic standards, particularly for those students who had been furthest from achieving the standards; and

(3) Revise the plan, as necessary, based on the results of the evaluation, to ensure continuous improvement of students in the schoolwide program.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6314)

18. Revise §§ 200.27 and 200.28 and place them under the undesignated center heading ''Schoolwide Programs'' in subpart A of part 200 to read as follows:

§ 200.27 Development of a schoolwide program plan.

(a)(1) A school operating a schoolwide program must develop a comprehensive plan to improve teaching and learning throughout the school.

(2) The school must develop the comprehensive plan in consultation with the LEA and its school support team or other technical assistance provider under section 1117 of the ESEA.

(3) The comprehensive plan must—

(i) Describe how the school will carry out each of the components under § 200.28;

(ii) Describe how the school will use resources under subpart A of this part and from other sources to carry out the components under § 200.28; and

(iii) Include a list of State and local programs and other Federal programs under § 200.29 that the school will consolidate in the schoolwide program.

(b)(1) The school must develop the comprehensive plan, including the comprehensive needs assessment, over a one-year period unless—

(i) The LEA, after considering the recommendations of its technical assistance providers under section 1117 of the ESEA, determines that less time is needed to develop and implement the schoolwide program; or

(ii) The school was operating a schoolwide program on or before January 7, 2002, in which case the school may continue to operate its program, but must amend its existing plan to reflect the provisions of §§ 200.25 through 200.29 during the 2002–2003 school year.

(2) The school must develop the comprehensive plan with the involvement of parents, consistent with the requirements of section 1118 of the ESEA, and other members of the community to be served and individuals who will carry out the plan, including—

(i) Teachers, principals, and administrators, including administrators of programs described in other parts of Title I of the ESEA;

(ii) If appropriate, pupil services personnel, technical assistance providers, and other school staff; and

(iii) If the plan relates to a secondary school, students from the school.

(3) If appropriate, the school must develop the comprehensive plan in coordination with other programs, including those carried out under Reading First, Early Reading First, Even Start, the Carl D. Perkins Vocational and Technical Education Act of 1998, and the Head Start Act.

(4) The comprehensive plan remains in effect for the duration of the school's participation under §§ 200.25 through 200.29.

(c)(1) The schoolwide program plan must be available to the LEA, parents, and the public.

(2) Information in the plan must be—

(i) In an understandable and uniform format, including alternative formats upon request; and

(ii) To the extent practicable, provided in a language that the parents can understand.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6314)

§ 200.28 Schoolwide program components.

A schoolwide program must include the following components:

(a) *Schoolwide reform strategies.* The schoolwide program must incorporate reform strategies in the overall instructional program. Those strategies must—

(1) Provide opportunities for all students to meet the State's proficient and advanced levels of student academic achievement;

(2)(i) Address the needs of all students in the school, particularly the needs of low-achieving students and those at risk of not meeting the State's student academic achievement standards who are members of the target population of any program included in the schoolwide program; and

(ii) Address how the school will determine if those needs have been met;

(3) Use effective methods and instructional practices that are based on scientifically based research, as defined in section 9101 of the ESEA, and that—

(i) Strengthen the core academic program;

(ii) Provide an enriched and accelerated curriculum;

(iii) Increase the amount and quality of learning time, such as providing an extended school year and before- and after-school and summer programs and opportunities;

(iv) Include strategies for meeting the educational needs of historically underserved populations; and

(v) Are consistent with, and are designed to implement, State and local improvement plans, if any.

(b) *Instruction by highly qualified teachers.* A schoolwide program must ensure instruction by highly qualified teachers and provide ongoing professional development. The schoolwide program must—

(1) Include strategies to attract highly qualified teachers, as defined in § 200.56;

(2)(i) Provide high-quality and ongoing professional development in accordance with sections 1119 and 9101(34) of the ESEA for teachers, principals, paraprofessionals and, if appropriate, pupil services personnel, parents, and other staff, to enable all students in the school to meet the State's student academic standards; and

(ii) Align professional development with the State's academic standards;

(3) Devote sufficient resources to carry out effectively the professional development activities described in paragraph (b)(2) of this section; and

(4) Include teachers in professional development activities regarding the use of academic assessments described in § 200.2 to enable them to provide information on, and to improve, the achievement of individual students and the overall instructional program.

(c) *Parental involvement.* (1) A schoolwide program must involve parents in the planning, review, and improvement of the schoolwide program plan.

(2) A schoolwide program must have a parental involvement policy, consistent with section 1118(b) of the ESEA, that—

(i) Includes strategies, such as family literacy services, to increase parental involvement in accordance with sections 1118(c) through (f) and 9101(32) of the ESEA; and

(ii) Describes how the school will provide individual student academic assessment results, including an interpretation of those results, to the parents of students who participate in the academic assessments required by § 200.2.

(d) *Additional support.* A schoolwide program school must include activities to ensure that students who experience difficulty attaining the proficient or advanced levels of academic achievement standards required by § 200.1 will be provided with effective, timely additional support, including measures to—

(1) Ensure that those students' difficulties are identified on a timely basis; and

(2) Provide sufficient information on which to base effective assistance to those students.

(e) *Transition.* A schoolwide program in an elementary school must include plans for assisting preschool students in the successful transition from early childhood programs, such as Head Start, Even Start, Early Reading First, or a preschool program under IDEA or a State-run preschool program, to the schoolwide program.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6314)

19. Add § 200.29 and place it under the undesignated center heading ''Schoolwide Programs'' in subpart A of part 200 to read as follows:

§ 200.29 Consolidation of funds in a schoolwide program.

(a) In addition to funds under subpart A of this part, a school may consolidate and use in its schoolwide program Federal funds from any program administered by the Secretary that is included in the most recent notice published for this purpose in the **Federal Register**.

(2) For purposes of §§ 200.25 through 200.29, the authority to consolidate funds from other Federal programs also applies to services provided to the school with those funds.

(b)(1) Except as provided in paragraphs (b)(2) and (c) of this section, a school that consolidates and uses in a schoolwide program funds from any other Federal program administered by the Secretary—

(i) Is not required to meet the statutory or regulatory requirements of that program applicable at the school level; but

(ii) Must meet the intent and purposes of that program to ensure that the needs of the intended beneficiaries of that program are addressed.

(2) A school that chooses to consolidate funds from other Federal programs must meet the requirements of those programs relating to—

(i) Health;

(ii) Safety;

(iii) Civil rights;

(iv) Student and parental participation and involvement;

(v) Services to private school children;

(vi) Maintenance of effort;

(vii) Comparability of services;

(viii) Use of Federal funds to supplement, not supplant non-Federal funds in accordance with § 200.25(d); and

(ix) Distribution of funds to SEAs or LEAs.

(c) A school must meet the following requirements if the school consolidates and uses funds from these programs in its schoolwide program:

(1) *Migrant education.* Before the school chooses to consolidate in its schoolwide program funds received under part C of Title I of the ESEA, the school must—

(i) Use these funds, in consultation with parents of migratory children or organizations representing those parents, or both, first to meet the unique educational needs of migratory students that result from the effects of their migratory lifestyle, and those other needs that are necessary to permit these students to participate effectively in school, as identified through the comprehensive Statewide needs assessment under § 200.83; and

(ii) Document that these needs have been met.

(2) *Indian education.* The school may consolidate funds received under subpart 1 of part A of Title VII of the ESEA if the parent committee established by the LEA under section 7114(c)(4) of the ESEA approves the inclusion of these funds.

(3) *Special education.* (i) The school may consolidate funds received under part B of the IDEA.

(ii) However, the amount of funds consolidated may not exceed the amount received by the LEA under part B of IDEA for that fiscal year, divided by the number of children with disabilities in the jurisdiction of the LEA, and multiplied by the number of children with disabilities participating in the schoolwide program.

(iii) The school may also consolidate funds received under section 8003(d) of the ESEA (Impact Aid) for children with disabilities in a schoolwide program.

(iv) A school that consolidates funds under part B of IDEA or section 8003(d) of the ESEA may use those funds for any activities under its schoolwide program plan but must comply with all other requirements of part B of IDEA, to the same extent it would if it did not consolidate funds under part B of IDEA or section 8003(d) of the ESEA in the schoolwide program.

(d) A school that consolidates and uses in a schoolwide program funds under subpart A of this part or from any other Federal program administered by the Secretary—

(1) Is not required to maintain separate fiscal accounting records, by program, that identify the specific activities supported by those particular funds; but

(2) Must maintain records that demonstrate that the schoolwide program, as a whole, addresses the intent and purposes of each of the Federal programs whose funds were consolidated to support the schoolwide program.

(e) Each State must—

(1) Encourage schools to consolidate funds from other Federal, State, and local sources in their schoolwide programs; and

(2) Modify or eliminate State fiscal and accounting barriers so that schools can easily consolidate funds from other Federal, State, and local sources in their schoolwide programs.

(Authority: 20 U.S.C. 6314, 1413(a)(s)(D), 6396(b), 7703(d), 7815(c))

20. Add a new undesignated center heading to subpart A of part 200 and place it after § 200.29 to read as follows:

LEA and School Improvement

21. Transfer §§ 200.30 through 200.69 to subpart A of part 200.

22. Revise § 200.30 and place it under the new undesignated center heading ''LEA and School Improvement'' in subpart A of part 200 to read as follows:

§ 200.30 Local review.

(a) Each LEA receiving funds under subpart A of this part must use the results of the State assessment system described in § 200.2 to review annually the progress of each school served under subpart A of this part to determine whether the school is making AYP in accordance with § 200.20.

(b)(1) In reviewing the progress of an elementary or secondary school operating a targeted assistance program, an LEA may choose to review the progress of only the students in the school who are served, or are eligible for services, under subpart A of this part.

(2) The LEA may exercise the option under paragraph (b)(1) of this section so long as the students selected for services under the targeted assistance program are those with the greatest need for special assistance, consistent with the requirements of section 1115 of the ESEA.

(c)(1) To determine whether schools served under subpart A of this part are making AYP, an LEA also may use any additional academic assessments or any other academic indicators described in the LEA's plan.

(2)(i) The LEA may use these assessments and indicators—

(A) To identify additional schools for school improvement or in need of corrective action or restructuring; and

(B) To permit a school to make AYP if, in accordance with § 200.20(b), the school also reduces the percentage of a student group not meeting the State's proficient level of academic achievement by at least 10 percent.

(ii) The LEA may not, with the exception described in paragraph (c)(2)(i)(B) of this section, use these assessments and indicators to reduce the number of, or change the identity of, the schools that would otherwise be identified for school improvement, corrective action, or restructuring if the LEA did not use these additional indicators.

(d) The LEA must publicize and disseminate the results of its annual progress review to parents, teachers, principals, schools, and the community.

(e) The LEA must review the effectiveness of actions and activities that schools are carrying out under subpart A of this part with respect to parental involvement, professional development, and other activities assisted under subpart A of this part.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6316(a) and (b))

23. Add new §§ 200.31 through 200.39 and place them under the new undesignated center heading ''LEA and School Improvement'' in subpart A of part 200 to read as follows:

§ 200.31 Opportunity to review school-level data.

(a) Before identifying a school for school improvement, corrective action, or restructuring, an LEA must provide the school with an opportunity to review the school-level data, including academic assessment data, on which the proposed identification is based.

(b)(1) If the principal of a school that an LEA proposes to identify for school improvement, corrective action, or restructuring believes, or a majority of the parents of the students enrolled in the school believe, that the proposed identification is in error for statistical or other substantive reasons, the principal may provide supporting evidence to the LEA.

(2) The LEA must consider the evidence referred to in paragraph (b)(1) of this section before making a final determination.

(c) The LEA must make public a final determination of the status of the school with respect to identification not later than 30 days after it provides the school with the opportunity to review the data on which the proposed identification is based.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6316(b)(2))

§ 200.32 Identification for school improvement.

(a)(1) An LEA must identify for school improvement any elementary or secondary school served under subpart A of this part that fails, for two consecutive years, to make AYP as defined under §§ 200.13 through 200.20.

(2) The LEA must make the identification described in paragraph (a)(1) of this section before the beginning of the school year following the year in which the LEA administered the assessments that resulted in the school's failure to make AYP for a second consecutive year.

(b)(1) An LEA must treat any school that was in the first year of school improvement status on January 7, 2002 as a school that is in the first year of school improvement under § 200.39 for the 2002–2003 school year.

(2) Not later than the first day of the 2002–2003 school year, the LEA must, in accordance with § 200.44, provide public school choice to all students in the school.

(c)(1) An LEA must treat any school that was identified for school improvement for two or more consecutive years on January 7, 2002 as a school that is in its second year of school improvement under § 200.39 for the 2002–2003 school year.

(2) Not later than the first day of the 2002–2003 school year, the LEA must—

(i) In accordance with § 200.44, provide public school choice to all students in the school; and

(ii) In accordance with § 200.45, make available supplemental educational services to eligible students who remain in the school.

(d) An LEA may remove from improvement status a school otherwise subject to the requirements of paragraphs (b) or (c) of this section if, on the basis of assessments the LEA administers during the 2001–2002 school year, the school makes AYP for a second consecutive year.

(e)(1) An LEA may, but is not required to, identify a school for improvement if, on the basis of assessments the LEA administers during the 2001–2002 school year, the school fails to make AYP for a second consecutive year.

(2) An LEA that does not identify such a school for improvement, however, must count the 2001–2002 school year as the first year of not making AYP for the purpose of subsequent identification decisions under paragraph (a) of this section.

(f) If an LEA identifies a school for improvement after the beginning of the school year following the year in which the LEA administered the assessments that resulted in the school's failure to make AYP for a second consecutive year—

(1) The school is subject to the requirements of school improvement under § 200.39 immediately upon identification, including the provision of public school choice; and

(2) The LEA must count that school year as a full school year for the purposes of subjecting the school to additional improvement measures if the school continues to fail to make AYP.

(Authority: 20 U.S.C. 6316)

§ 200.33 Identification for corrective action.

(a) If a school served by an LEA under subpart A of this part fails to make AYP by the end of the second full school year after the LEA has identified the school for improvement under § 200.32(a) or (b), or by the end of the first full school year after the LEA has identified the school for improvement under § 200.32(c), the LEA must identify the school for corrective action under § 200.42.

(b) If a school was subject to corrective action on January 7, 2002, the LEA must—

(1) Treat the school as a school identified for corrective action under § 200.42 for the 2002–2003 school year; and

(2) Not later than the first day of the 2002–2003 school year—

(i) In accordance with § 200.44, provide public school choice to all students in the school;

(ii) In accordance with § 200.45, make available supplemental educational services to eligible students who remain in the school; and

(iii) Take corrective action under § 200.42.

(c) An LEA may remove from corrective action a school otherwise subject to the requirements of paragraphs (a) or (b) of this section if, on the basis of assessments administered by the LEA during the 2001–2002 school year, the school makes AYP for a second consecutive year.

(Approved by the Office of Management and Budget under control number 1810–0576)

(Authority: 20 U.S.C. 6316)

§ 200.34 Identification for restructuring.

(a) If a school continues to fail to make AYP after one full school year of corrective action under § 200.42, the LEA must prepare a restructuring plan for the school and make arrangements to implement the plan.

(b) If the school continues to fail to make AYP, the LEA must implement the

restructuring plan no later than the beginning of the school year following the year in which the LEA developed the restructuring plan under paragraph (a) of this section.

(Approved by the Office of Management and Budget under control number 1810–0576)

(Authority: 20 U.S.C. 6316(b)(8))

§ 200.35 Delay and removal.

(a) *Delay.* (1) An LEA may delay, for a period not to exceed one year, implementation of requirements under the second year of school improvement, under corrective action, or under restructuring if—

(i) The school makes AYP for one year; or

(ii) The school's failure to make AYP is due to exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the LEA or school.

(2) The LEA may not take into account a period of delay under paragraph (a) of this section in determining the number of consecutive years of the school's failure to make AYP.

(3) Except as provided in paragraph (b) of this section, the LEA must subject the school to further actions as if the delay never occurred.

(b) *Removal.* If any school identified for school improvement, corrective action, or restructuring makes AYP for two consecutive school years, the LEA may not, for the succeeding school year—

(1) Subject the school to the requirements of school improvement, corrective action, or restructuring; or

(2) Identify the school for improvement.

(Authority: 20 U.S.C. 6316(b))

§ 200.36 Communication with parents.

(a) Throughout the school improvement process, the State, LEA, or school must communicate with the parents of each child attending the school.

(b) The State, LEA, or school must ensure that, regardless of the method or media used, it provides the information required by §§ 200.37 and 200.38 to parents—

(1) In an understandable and uniform format, including alternative formats upon request; and

(2) To the extent practicable, in a language that parents can understand.

(c) The State, LEA, or school must provide information to parents—

(1) Directly, through such means as regular mail or e-mail, except that if a State does not have access to individual student addresses, it may provide information to the LEA or school for distribution to parents; and

(2) Through broader means of dissemination such as the Internet, the media, and public agencies serving the student population and their families.

(d) All communications must respect the privacy of students and their families.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6316)

§ 200.37 Notice of identification for improvement, corrective action, or restructuring.

(a) If an LEA identifies a school for improvement or subjects the school to corrective action or restructuring, the LEA must, consistent with the requirements of § 200.36, promptly notify the parent or parents of each child enrolled in the school of this identification.

(b) The notice referred to in paragraph (a) of this section must include the following:

(1) An explanation of what the identification means, and how the school compares in terms of academic achievement to other elementary and secondary schools served by the LEA and the SEA involved.

(2) The reasons for the identification.

(3) An explanation of how parents can become involved in addressing the academic issues that led to identification.

(4)(i) An explanation of the parents' option to transfer their child to another public school, including the provision of transportation to the new school, in accordance with § 200.44.

(ii) The explanation of the parents' option to transfer must include, at a minimum, information on the academic achievement of the school or schools to which the child may transfer.

(iii) The explanation may include other information on the school or schools to which the child may transfer, such as—

(A) A description of any special academic programs or facilities;

(B) The availability of before- and after-school programs;

(C) The professional qualifications of teachers in the core academic subjects; and

(D) A description of parental involvement opportunities.

(5)(i) If the school is in its second year of improvement or subject to corrective action or restructuring, a notice explaining how parents can obtain supplemental educational services for their child in accordance with § 200.45.

(ii) The annual notice of the availability of supplemental educational services must include, at a minimum, the following:

(A) The identity of approved providers of those services available within the LEA, including providers of technology-based or distance-learning supplemental educational services, and providers that make services reasonably available in neighboring LEAs.

(B) A brief description of the services, qualifications, and demonstrated effectiveness of the providers referred to in paragraph (b)(5)(ii)(A) of this section.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6316)

§ 200.38 Information about action taken.

(a) An LEA must publish and disseminate to the parents of each student enrolled in the school, consistent with the requirements of § 200.36, and to the public information regarding any action taken by a school and the LEA to address the problems that led to the LEA's identification of the school for improvement, corrective action, or restructuring.

(b) The information referred to in paragraph (a) of this section must include the following:

(1) An explanation of what the school is doing to address the problem of low achievement.

(2) An explanation of what the LEA or SEA is doing to help the school address the problem of low achievement.

(3) If applicable, a description of specific corrective actions or restructuring plans.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6316(b))

§ 200.39 Responsibilities resulting from identification for school improvement.

(a) If an LEA identifies a school for school improvement under § 200.32—

(1) The LEA must—

(i) Not later than the first day of the school year following identification, with the exception described in § 200.32(f), provide all students enrolled in the school with the option to transfer, in accordance with § 200.44, to another public school served by the LEA; and

(ii) Ensure that the school receives technical assistance in accordance with § 200.40; and

(2) The school must develop or revise a school improvement plan in accordance with § 200.41.

(b) If a school fails to make AYP by the end of the first full school year after the LEA has identified it for improvement under § 200.32, the LEA must—

(1) Continue to provide all students enrolled in the school with the option

to transfer, in accordance with § 200.44, to another public school served by the LEA;

(2) Continue to ensure that the school receives technical assistance in accordance with § 200.40; and

(3) Make available supplemental educational services in accordance with § 200.45.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6316(b))

24. Revise §§ 200.40 through 200.45 and place them under the new undesignated center heading ''LEA and School Improvement'' in subpart A of part 200 to read as follows:

§ 200.40 Technical assistance.

(a) An LEA that identifies a school for improvement under § 200.32 must ensure that the school receives technical assistance as the school develops and implements its improvement plan under § 200.41 and throughout the plan's duration.

(b) The LEA may arrange for the technical assistance to be provided by one or more of the following:

(1) The LEA through the statewide system of school support and recognition described under section 1117 of the ESEA.

(2) The SEA.

(3) An institution of higher education that is in full compliance with all of the reporting provisions of Title II of the Higher Education Act of 1965.

(4) A private not-for-profit organization, a private for-profit organization, an educational service agency, or another entity with experience in helping schools improve academic achievement.

(c) The technical assistance must include the following:

(1) Assistance in analyzing data from the State assessment system, and other examples of student work, to identify and develop solutions to problems in—

(i) Instruction;

(ii) Implementing the requirements for parental involvement and professional development under this subpart; and

(iii) Implementing the school plan, including LEA- and school-level responsibilities under the plan.

(2) Assistance in identifying and implementing professional development and instructional strategies and methods that have proved effective, through scientifically based research, in addressing the specific instructional issues that caused the LEA to identify the school for improvement.

(3) Assistance in analyzing and revising the school's budget so that the school allocates its resources more effectively to the activities most likely to—

(i) Increase student academic achievement; and

(ii) Remove the school from school improvement status.

(d) Technical assistance provided under this section must be based on scientifically based research.

(Authority: 20 U.S.C. 6316(b)(4))

§ 200.41 School improvement plan.

(a)(1) Not later than three months after an LEA has identified a school for improvement under § 200.32, the school must develop or revise a school improvement plan for approval by the LEA.

(2) The school must consult with parents, school staff, the LEA, and outside experts in developing or revising its school improvement plan.

(b) The school improvement plan must cover a 2-year period.

(c) The school improvement plan must—

(1) Specify the responsibilities of the school, the LEA, and the SEA serving the school under the plan, including the technical assistance to be provided by the LEA under § 200.40;

(2)(i) Incorporate strategies, grounded in scientifically based research, that will strengthen instruction in the core academic subjects at the school and address the specific academic issues that caused the LEA to identify the school for improvement; and

(ii) May include a strategy for implementing a comprehensive school reform model described in section 1606 of the ESEA;

(3) With regard to the school's core academic subjects, adopt policies and practices most likely to ensure that all groups of students described in § 200.13(b)(7) and enrolled in the school will meet the State's proficient level of achievement, as measured by the State's assessment system, not later than the 2013–2014 school year;

(4) Establish measurable goals that—

(i) Address the specific reasons for the school's failure to make adequate progress; and

(ii) Promote, for each group of students described in § 200.13(b)(7) and enrolled in the school, continuous and substantial progress that ensures that all these groups meet the State's annual measurable objectives described in § 200.18;

(5) Provide an assurance that the school will spend not less than 10 percent of the allocation it receives under subpart A of this part for each year that the school is in school improvement status, for the purpose of providing high-quality professional development to the school's teachers, principal, and, as appropriate, other instructional staff, consistent with section 9101(34) of the ESEA, that—

(i) Directly addresses the academic achievement problem that caused the school to be identified for improvement;

(ii) Is provided in a manner that affords increased opportunity for participating in that professional development; and

(iii) Incorporates teacher mentoring activities or programs;

(6) Specify how the funds described in paragraph (c)(5) of this section will be used to remove the school from school improvement status;

(7) Describe how the school will provide written notice about the identification to parents of each student enrolled in the school;

(8) Include strategies to promote effective parental involvement at the school; and

(9) As appropriate, incorporate activities before school, after school, during the summer, and during any extension of the school year.

(d)(1) Within 45 days of receiving a school improvement plan, the LEA must—

(i) Establish a peer-review process to assist with review of the plan;

(ii) Promptly review the plan;

(iii) Work with the school to make any necessary revisions; and

(iv) Approve the plan if it meets the requirements of this section.

(2) The LEA may condition approval of the school improvement plan on—

(i) Inclusion of one or more of the corrective actions specified in § 200.42; or

(ii) Feedback on the plan from parents and community leaders.

(e) A school must implement its school improvement plan immediately on approval of the plan by the LEA.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6316(b)(3))

§ 200.42 Corrective action.

(a) *Definition.* ''Corrective action'' means action by an LEA that—

(1) Substantially and directly responds to—

(i) The consistent academic failure of a school that led the LEA to identify the school for corrective action; and

(ii) Any underlying staffing, curriculum, or other problems in the school;

(2) Is designed to increase substantially the likelihood that each group of students described in § 200.13(b)(7) and enrolled in the school will meet or exceed the State's proficient levels of achievement as

measured by the State assessment system; and

(3) Is consistent with State law.

(b) *Requirements.* If an LEA identifies a school for corrective action, in accordance with § 200.33, the LEA must do the following:

(1) Continue to provide all students enrolled in the school with the option to transfer to another public school in accordance with § 200.44.

(2) Continue to ensure that the school receives technical assistance consistent with the requirements of § 200.40.

(3) Make available supplemental educational services in accordance with § 200.45.

(4) Take at least one of the following corrective actions:

(i) Replace the school staff who are relevant to the school's failure to make AYP.

(ii) Institute and fully implement a new curriculum, including the provision of appropriate professional development for all relevant staff, that—

(A) Is grounded in scientifically based research; and

(B) Offers substantial promise of improving educational achievement for low-achieving students and of enabling the school to make AYP.

(iii) Significantly decrease management authority at the school level.

(iv) Appoint one or more outside experts to advise the school on—

(A) Revising the school improvement plan developed under § 200.41 to address the specific issues underlying the school's continued failure to make AYP and resulting in identification for corrective action; and

(B) Implementing the revised improvement plan.

(v) Extend for that school the length of the school year or school day.

(vi) Restructure the internal organization of the school.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6316(b)(7))

§ 200.43 Restructuring.

(a) *Definition.* ''Restructuring'' means a major reorganization of a school's governance arrangement by an LEA that—

(1) Makes fundamental reforms, such as significant changes in the school's staffing and governance, to improve student academic achievement in the school;

(2) Has substantial promise of enabling the school to make AYP as defined under §§ 200.13 through 200.20; and

(3) Is consistent with State law.

(b) *Requirements.* If the LEA identifies a school for restructuring in accordance with § 200.34, the LEA must do the following:

(1) Continue to provide all students enrolled in the school with the option to transfer to another public school in accordance with § 200.44.

(2) Make available supplemental educational services in accordance with § 200.45.

(3) Prepare a plan to carry out one of the following alternative governance arrangements:

(i) Reopen the school as a public charter school.

(ii) Replace all or most of the school staff, which may include the principal, who are relevant to the school's failure to make AYP.

(iii) Enter into a contract with an entity, such as a private management company, with a demonstrated record of effectiveness, to operate the school as a public school.

(iv) Turn the operation of the school over to the SEA, if permitted under State law and agreed to by the State.

(v) Any other major restructuring of a school's governance arrangement consistent with this section.

(4) Provide to parents and teachers—

(i) Prompt notice that the LEA has identified the school for restructuring; and

(ii) An opportunity for parents and teachers to—

(A) Comment before the LEA takes any action under a restructuring plan; and

(B) Participate in the development of any restructuring plan.

(c) *Implementation.* (1) If a school continues to fail to make AYP, the LEA must—

(i) Implement the restructuring plan no later than the beginning of the school year following the year in which the LEA developed the restructuring plan under paragraph (b)(3) of this section; and

(ii) Continue to offer public school choice and supplemental educational services in accordance with §§ 200.44 and 200.45.

(2) An LEA is no longer required to carry out the requirements of paragraph (c)(1) of this section if the restructured school makes AYP for two consecutive school years.

(d) *Rural schools.* On request, the Secretary will provide technical assistance for developing and carrying out a restructuring plan to any rural LEA—

(1) That has fewer than 600 students in average daily attendance at all of its schools; and

(2) In which all of the schools have a School Locale Code of 7 or 8, as determined by the National Center for Education Statistics.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6316(b)(8))

§ 200.44 Public school choice.

(a) *Requirements.* (1) In the case of a school identified for school improvement under § 200.32, for corrective action under § 200.33, or for restructuring under § 200.34, the LEA must provide all students enrolled in the school with the option to transfer to another public school served by the LEA.

(2) The LEA must offer this option not later than the first day of the school year following the year in which the LEA administered the assessments that resulted in its identification of the school for improvement, corrective action, or restructuring.

(3) The schools to which students may transfer under paragraph (a)(1) of this section—

(i) May not include schools that—

(A) The LEA has identified for improvement under § 200.32, corrective action under § 200.33, or restructuring under § 200.34; or

(B) Are persistently dangerous as determined by the State; and

(ii) May include one or more public charter schools.

(4) If more than one school meets the requirements of paragraph (a)(3) of this section, the LEA must—

(i) Provide to parents of students eligible to transfer under paragraph (a)(1) of this section a choice of more than one such school; and

(ii) Take into account the parents' preferences among the choices offered under paragraph (a)(4)(i) of this section.

(5) The LEA must offer the option to transfer described in this section unless it is prohibited by State law in accordance with paragraph (b) of this section.

(6) Except as described in §§ 200.32(d) and 200.33(c), if a school was in school improvement or subject to corrective action before January 8, 2002, the State must ensure that the LEA provides a public school choice option in accordance with paragraph (a)(1) of this section not later than the first day of the 2002–2003 school year.

(b) *Limitation on State law prohibition.* An LEA may invoke the State law prohibition on choice described in paragraph (a)(5) of this section only if the State law prohibits choice through restrictions on public school assignments or the transfer of students from one public school to another public school.

(c) *Desegregation plans.* (1) If an LEA is subject to a desegregation plan, whether that plan is voluntary, court-

ordered, or required by a Federal or State administrative agency, the LEA is not exempt from the requirement in paragraph (a)(1) of this section.

(2) In determining how to provide students with the option to transfer to another school, the LEA may take into account the requirements of the desegregation plan.

(3) If the desegregation plan forbids the LEA from offering the transfer option required under paragraph (a)(1) of this section, the LEA must secure appropriate changes to the plan to permit compliance with paragraph (a)(1) of this section.

(d) *Capacity.* An LEA may not use lack of capacity to deny students the option to transfer under paragraph (a)(1) of this section.

(e) *Priority.* (1) In providing students the option to transfer to another public school in accordance with paragraph (a)(1) of this section, the LEA must give priority to the lowest-achieving students from low-income families.

(2) The LEA must determine family income on the same basis that the LEA uses to make allocations to schools under subpart A of this part.

(f) *Status.* Any public school to which a student transfers under paragraph (a)(1) of this section must ensure that the student is enrolled in classes and other activities in the school in the same manner as all other students in the school.

(g) *Duration of transfer.* (1) If a student exercises the option under paragraph (a)(1) of this section to transfer to another public school, the LEA must permit the student to remain in that school until the student has completed the highest grade in the school.

(2) The LEA's obligation to provide transportation for the student may be limited under the circumstances described in paragraph (i) of this section and in § 200.48.

(h) *No eligible schools within an LEA.* If all public schools to which a student may transfer within an LEA are identified for school improvement, corrective action, or restructuring, the LEA—

(1) Must, to the extent practicable, establish a cooperative agreement for a transfer with one or more other LEAs in the area; and

(2) May offer supplemental educational services to eligible students under § 200.45 in schools in their first year of school improvement under § 200.39.

(i) *Transportation.* (1) If a student exercises the option under paragraph (a)(1) of this section to transfer to another public school, the LEA must, consistent with § 200.48, provide or pay for the student's transportation to the school.

(2) The limitation on funding in § 200.48 applies only to the provision of choice-related transportation, and does not affect in any way the basic obligation to provide an option to transfer as required by paragraph (a) of this section.

(3) The LEA's obligation to provide transportation for the student ends at the end of the school year in which the school from which the student transferred is no longer identified by the LEA for school improvement, corrective action, or restructuring.

(j) *Students with disabilities and students covered under Section 504 of the Rehabilitation Act of 1973 (Section 504).* For students with disabilities under the IDEA and students covered under Section 504, the public school choice option must provide a free appropriate public education as that term is defined in section 602(8) of the IDEA or 34 CFR 104.33, respectively.

(Authority: 20 U.S.C. 6316)

§ 200.45 Supplemental educational services.

(a) *Definition.* ''Supplemental educational services'' means tutoring and other supplemental academic enrichment services that are—

(1) In addition to instruction provided during the school day;

(2) Specifically designed to—

(i) Increase the academic achievement of eligible students as measured by the State's assessment system; and

(ii) Enable these children to attain proficiency in meeting State academic achievement standards; and

(3) Of high quality and research-based.

(b) *Eligibility.* (1) Only students from low-income families are eligible for supplemental educational services.

(2) The LEA must determine family income on the same basis that the LEA uses to make allocations to schools under subpart A of this part.

(c) *Requirement.* (1) If an LEA identifies a school for a second year of improvement under § 200.32, corrective action under § 200.33, or restructuring under § 200.34, the LEA must arrange, consistent with paragraph (d) of this section, for each eligible student in the school to receive supplemental educational services from a State-approved provider selected by the student's parents.

(2) Except as described in §§ 200.32(d) and 200.33(c), if a school was in school improvement status for two or more consecutive school years or subject to corrective action on January 7, 2002, the State must ensure that the LEA makes available, consistent with paragraph (d) of this section, supplemental educational services to all eligible students not later than the first day of the 2002–2003 school year.

(3) The LEA must, consistent with § 200.48, continue to make available supplemental educational services to eligible students until the end of the school year in which the LEA is making those services available.

(4)(i) At the request of an LEA, the SEA may waive, in whole or in part, the requirement that the LEA make available supplemental educational services if the SEA determines that—

(A) None of the providers of those services on the list approved by the SEA under § 200.47 makes those services available in the area served by the LEA or within a reasonable distance of that area; and

(B) The LEA provides evidence that it is not otherwise able to make those services available.

(ii) The SEA must notify the LEA, within 30 days of receiving the LEA's request for a waiver under paragraph (c)(4)(i) of this section, whether it approves or disapproves the request and, if it disapproves, the reasons for the disapproval, in writing.

(iii) An LEA that receives a waiver must renew its request for that waiver on an annual basis.

(d) *Priority.* If the amount of funds available for supplemental educational services is insufficient to provide services to each student whose parents request these services, the LEA must give priority to the lowest-achieving students.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6316)

25. Add new §§ 200.46 through 200.49 and place them under the new undesignated center heading ''LEA and School Improvement'' in subpart A of part 200 to read as follows:

§ 200.46 LEA responsibilities for supplemental educational services.

(a) If an LEA is required to make available supplemental educational services under § 200.39(b)(3), § 200.42(b)(3), or § 200.43(b)(2), the LEA must do the following:

(1) Provide the annual notice to parents described in § 200.37(b)(5).

(2) If requested, assist parents in choosing a provider from the list of approved providers maintained by the SEA.

(3) Apply fair and equitable procedures for serving students if the number of spaces at approved providers is not sufficient to serve all eligible

students whose parents request services consistent with § 200.45.

(4) Ensure that eligible students with disabilities under IDEA and students covered under Section 504 receive appropriate supplemental educational services and accommodations in the provision of those services.

(5) Ensure that eligible students who have limited English proficiency receive appropriate supplemental educational services and language assistance in the provision of those services.

(6) Not disclose to the public, without the written permission of the student's parents, the identity of any student who is eligible for, or receiving, supplemental educational services.

(b)(1) In addition to meeting the requirements in paragraph (a) of this section, the LEA must enter into an agreement with each provider selected by a parent or parents.

(2) The agreement must—

(i) Require the LEA to develop, in consultation with the parents and the provider, a statement that includes—

(A) Specific achievement goals for the student;

(B) A description of how the student's progress will be measured; and

(C) A timetable for improving achievement;

(ii) Describe procedures for regularly informing the student's parents and teachers of the student's progress;

(iii) Provide for the termination of the agreement if the provider is unable to meet the goals and timetables specified in the agreement;

(iv) Specify how the LEA will pay the provider; and

(v) Prohibit the provider from disclosing to the public, without the written permission of the student's parents, the identity of any student who is eligible for, or receiving, supplemental educational services.

(3) In the case of a student with disabilities under IDEA or a student covered under Section 504, the provisions of the agreement referred to in paragraph (b)(2)(i) of this section must be consistent with the student's individualized education program under section 614(d) of the IDEA or the student's individualized services under Section 504.

(4) The LEA may not pay the provider for religious worship or instruction.

(c) If State law prohibits an SEA from carrying out one or more of its responsibilities under § 200.47 with respect to those who provide, or seek approval to provide, supplemental educational services, each LEA must carry out those responsibilities with respect to its students who are eligible for those services.

(Authority: 20 U.S.C. 6316(e))

(Approved by the Office of Management and Budget under control number 1810–0581)

§ 200.47 SEA responsibilities for supplemental educational services.

(a) If one or more LEAs in a State are required to make available supplemental educational services under § 200.39(b)(3), § 200.42(b)(3), or § 200.43(b)(2), the SEA for that State must do the following:

(1)(i) In consultation with affected LEAs, parents, teachers, and other interested members of the public, promote participation by as many providers as possible.

(ii) This promotion must include annual notice to potential providers of—

(A) The opportunity to provide supplemental educational services; and

(B) Procedures for obtaining the SEA's approval to be a provider of those services.

(2) Consistent with paragraph (b) of this section, develop and apply to potential providers objective criteria.

(3) Maintain by LEA an updated list of approved providers, including any technology-based or distance-learning providers, from which parents may select.

(4) Develop, implement, and publicly report on standards and techniques for—

(i) Monitoring the quality and effectiveness of the services offered by each approved provider; and

(ii) Withdrawing approval from a provider that fails, for two consecutive years, to contribute to increasing the academic proficiency of students receiving supplemental educational services from that provider.

(5) Ensure that eligible students with disabilities under IDEA and students covered under Section 504 receive appropriate supplemental educational services and accommodations in the provision of those services.

(6) Ensure that eligible students who have limited English proficiency receive appropriate supplemental educational services and language assistance in the provision of those services.

(b) *Standards for approving providers.* (1) As used in this section and in § 200.46, ''provider'' means a non-profit entity, a for-profit entity, an LEA, an educational service agency, a public school, including a public charter school, or a private school that—

(i) Has a demonstrated record of effectiveness in increasing the academic achievement of students in subjects relevant to meeting the State's academic content and student achievement standards described under § 200.1;

(ii) Is capable of providing supplemental educational services that are consistent with the instructional program of the LEA and with the State academic content standards and State student achievement standards described under § 200.1;

(iii) Is financially sound; and

(iv) In the case of—

(A) A public school, has not been identified under §§ 200.32, 200.33, or 200.34; or

(B) An LEA, has not been identified under § 200.50(d) or (e).

(2) In order for the SEA to include a provider on the State list, the provider must agree to—

(i)(A) Provide parents of each student receiving supplemental educational services and the appropriate LEA with information on the progress of the student in increasing achievement; and

(B) This information must be in an understandable and uniform format, including alternative formats upon request, and, to the extent practicable, in a language that the parents can understand;

(ii) Ensure that the instruction the provider gives and the content the provider uses—

(A) Are consistent with the instruction provided and the content used by the LEA and the SEA;

(B) Are aligned with State student academic achievement standards; and

(C) Are secular, neutral, and nonideological; and

(iii) Meet all applicable Federal, State, and local health, safety, and civil rights laws.

(3) As a condition of approval, a State may not require a provider to hire only staff who meet the requirements under §§ 200.55 and 200.56.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6316(e))

§ 200.48 Funding for choice-related transportation and supplemental educational services.

(a) *Amounts required.* (1) To pay for choice-related transportation and supplemental educational services required under section 1116 of the ESEA, an LEA may use—

(i) Funds allocated under subpart A of this part;

(ii) Funds, where allowable, from other Federal education programs; and

(iii) State, local, or private resources.

(2) Unless a lesser amount is needed, the LEA must spend an amount equal to 20 percent of its allocation under subpart A of this part to—

(i) Provide, or pay for, transportation of students exercising a choice option under § 200.44;

(ii) Satisfy all requests for supplemental educational services under § 200.45; or

(iii) Pay for both paragraph (a)(2)(i) and (ii) of this section, except that—

(A) The LEA must spend a minimum of an amount equal to 5 percent of its allocation under subpart A of this part on transportation under paragraph (a)(2)(i) of this section and an amount equal to 5 percent of its allocation under subpart A of this part for supplemental educational services under paragraph (a)(2)(ii) of this section, unless lesser amounts are needed to meet the requirements of §§ 200.44 and 200.45; and

(B) The LEA may not include costs for administration or transportation incurred in providing supplemental educational services, or administrative costs associated with the provision of public school choice options under § 200.44, in the amounts required under paragraph (a)(2) of this section.

(3) If the amount specified in paragraph (a)(2) of this section is insufficient to pay all choice-related transportation costs, or to meet the demand for supplemental educational services, the LEA may make available any additional needed funds from Federal, State, or local sources.

(4) To assist an LEA that does not have sufficient funds to make available supplemental educational services to all students requesting these services, an SEA may use funds that it reserves under part A of Title I and part A of Title V of the ESEA.

(b) *Cap on school-level reduction.* (1) An LEA may not, in applying paragraph (a) of this section, reduce by more than 15 percent the total amount it makes available under subpart A of this part to a school it has identified for corrective action or restructuring.

(c) *Per-child funding for supplemental educational services.* For each student receiving supplemental educational services under § 200.45, the LEA must make available the lesser of—

(1) The amount of its allocation under subpart A of this part, divided by the number of students from families below the poverty level, as counted under section 1124(c)(1)(A) of the ESEA; or

(2) The actual costs of the supplemental educational services received by the student.

(Authority: 20 U.S.C. 6316)

§ 200.49 SEA responsibilities for school improvement, corrective action, and restructuring.

(a) *Transition requirements for public school choice and supplemental educational services.* (1) Except as described in §§ 200.32(d) and 200.33(c), if a school was in school improvement or subject to corrective action on January 7, 2002, the SEA must ensure that the LEA for that school provides public school choice in accordance with § 200.44 not later than the first day of the 2002–2003 school year.

(2) Except as described in §§ 200.32(d) and 200.33(c), if a school was in school improvement status for two or more consecutive school years or subject to corrective action on January 7, 2002, the SEA must ensure that the LEA for that school makes available supplemental educational services in accordance with § 200.45 not later than the first day of the 2002–2003 school year.

(b) *State reservation of funds for school improvement.* (1) In accordance with § 200.100(a), an SEA must reserve 2 percent of the amount it receives under this part for fiscal years 2002 and 2003, and 4 percent of the amount it receives under this part for fiscal years 2004 through 2007, to—

(i) Support local school improvement activities;

(ii) Provide technical assistance to schools identified for improvement, corrective action, or restructuring; and

(iii) Provide technical assistance to LEAs that the SEA has identified for improvement or corrective action in accordance with § 200.50.

(2) Of the amount it reserves under paragraph (b)(1) of this section, the SEA must—

(i) Allocate not less than 95 percent directly to LEAs serving schools identified for improvement, corrective action, and restructuring to support improvement activities; or

(ii) With the approval of the LEA, directly provide for these improvement activities or arrange to provide them through such entities as school support teams or educational service agencies.

(3) In providing assistance to LEAs under paragraph (b)(2) of this section, the SEA must give priority to LEAs that—

(i) Serve the lowest-achieving schools;

(ii) Demonstrate the greatest need for this assistance; and

(iii) Demonstrate the strongest commitment to ensuring that this assistance will be used to enable the lowest-achieving schools to meet the progress goals in the school improvement plans under § 200.41.

(c) *Technical assistance.* The SEA must make technical assistance available, through the statewide system of support and improvement required by section 1117 of the ESEA, to schools that LEAs have identified for improvement, corrective action, or restructuring.

(d) *LEA failure.* If the SEA determines that an LEA has failed to carry out its responsibilities with respect to school improvement, corrective action, or restructuring, the SEA must take the actions it determines to be appropriate and in compliance with State law.

(e) *Assessment results.* (1) The SEA must ensure that the results of academic assessments administered as part of the State assessment system in a given school year are available to LEAs before the beginning of the next school year and in such time as to allow for the identification described in § 200.32(a)(2).

(2) The SEA must provide the results described in paragraph (e)(1) of this section to a school before an LEA may identify the school for school improvement under § 200.32, corrective action under § 200.33, or restructuring under § 200.34.

(f) *Accountability for charter schools.* The accountability provisions under section 1116 of the ESEA must be overseen for charter schools in accordance with State charter school law.

(g) *Factors affecting student achievement.* The SEA must notify the Secretary of Education of major factors that have been brought to the SEA's attention under section 1111(b)(9) of the ESEA that have significantly affected student academic achievement in schools and LEAs identified for improvement within the State.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6311 and 6316)

26. Revise §§ 200.50 and 200.51 and place them under the new undesignated center heading ''LEA and School Improvement'' in subpart A of part 200 to read as follows:

§ 200.50 SEA review of LEA progress.

(a) *State review.* (1) An SEA must annually review the progress of each LEA in its State that receives funds under subpart A of this part to determine whether—

(i) The LEA's schools served under this part are making AYP, as defined under §§ 200.13 through 200.20, toward meeting the State's student academic achievement standards; and

(ii) The LEA is carrying out its responsibilities under this part with respect to school improvement, technical assistance, parental involvement, and professional development.

(2) In reviewing the progress of an LEA, the SEA may, in the case of targeted assistance schools served by the LEA, consider the progress only of the students served or eligible for services under this subpart, provided the students selected for services in such schools are those with the greatest need

for special assistance, consistent with the requirements of section 1115 of the ESEA.

(b) Rewards. If an LEA has exceeded AYP as defined under §§ 200.13 through 200.20 for two consecutive years, the SEA may—

(1) Reserve funds in accordance with § 200.100(c); and

(2) Make rewards of the kinds described under section 1117 of the ESEA.

(c) *Opportunity for review of LEA-level data.* (1) Before identifying an LEA for improvement or corrective action, the SEA must provide the LEA with an opportunity to review the data, including academic assessment data, on which the SEA has based the proposed identification.

(2)(i) If the LEA believes that the proposed identification is in error for statistical or other substantive reasons, the LEA may provide supporting evidence to the SEA.

(ii) The SEA must consider the evidence before making a final determination not later than 30 days after it has provided the LEA with the opportunity to review the data under paragraph (c)(1) of this section.

(d) *Identification for improvement.* (1) The SEA must identify for improvement an LEA that, for two consecutive years, including the period immediately before January 8, 2002, fails to make AYP as defined in the SEA's plan under section 1111(b)(2) of the ESEA.

(2) The SEA must identify for improvement an LEA that was in improvement status on January 7, 2002.

(3)(i) The SEA may identify an LEA for improvement if, on the basis of assessments the LEA administers during the 2001–2002 school year, the LEA fails to make AYP for a second consecutive year.

(ii) An SEA that does not identify such an LEA for improvement, however, must count the 2001–2002 school year as the first year of not making AYP for the purpose of subsequent identification decisions under paragraph (d)(1) of this section.

(4) The SEA may remove an LEA from improvement status if, on the basis of assessments the LEA administers during the 2001–2002 school year, the LEA makes AYP for a second consecutive year.

(e) *Identification for corrective action.* After providing technical assistance under § 200.52(b), the SEA—

(1) May take corrective action at any time with respect to an LEA that the SEA has identified for improvement under paragraph (d) of this section;

(2) Must take corrective action—

(i) With respect to an LEA that fails to make AYP, as defined under §§ 200.13 through 200.20, by the end of the second full school year following the year in which the LEA administered the assessments that resulted in the LEA's failure to make AYP for a second consecutive year and led to the SEA's identification of the LEA for improvement under paragraph (d) of this section; and

(ii) With respect to an LEA that was in corrective action status on January 7, 2002; and

(3) May remove an LEA from corrective action if, on the basis of assessments administered by the LEA during the 2001–2002 school year, it makes AYP for a second consecutive year.

(f) *Delay of corrective action.* (1) The SEA may delay implementation of corrective action under § 200.53 for a period not to exceed one year if—

(i) The LEA makes AYP for one year; or

(ii) The LEA's failure to make AYP is due to exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the LEA's financial resources.

(2)(i) The SEA may not take into account the period of delay referred to in paragraph (f)(1) of this section in determining the number of consecutive years the LEA has failed to make AYP; and

(ii) The SEA must subject the LEA to further actions following the period of delay as if the delay never occurred.

(g) *Continuation of public school choice and supplemental educational services.* An SEA must ensure that an LEA identified under paragraph (d) or (e) of this section continues to offer public school choice in accordance with § 200.44 and supplemental educational services in accordance with § 200.45.

(h) *Removal from improvement or corrective action status.* If an LEA makes AYP for two consecutive years following identification for improvement under paragraph (d) or corrective action under paragraph (e) of this section, the SEA need no longer—

(1) Identify the LEA for improvement; or

(2) Subject the LEA to corrective action for the succeeding school year.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6316(c))

§ 200.51 Notice of SEA action.

(a) *In general.* (1) An SEA must—

(i) Communicate with parents throughout the review of an LEA under § 200.50; and

(ii) Ensure that, regardless of the method or media used, it provides information to parents—

(A) In an understandable and uniform format, including alternative formats upon request; and

(B) To the extent practicable, in a language that parents can understand.

(2) The SEA must provide information to the parents of each student enrolled in a school served by the LEA—

(i) Directly, through such means as regular mail or e-mail, except that if an SEA does not have access to individual student addresses, it may provide information to the LEA or school for distribution to parents; and

(ii) Through broader means of dissemination such as the Internet, the media, and public agencies serving the student population and their families.

(3) All communications must respect the privacy of students and their families.

(b) *Results of review.* The SEA must promptly publicize and disseminate to the LEAs, teachers and other staff, the parents of each student enrolled in a school served by the LEA, students, and the community the results of its review under § 200.50, including statistically sound disaggregated results in accordance with §§ 200.2 and 200.7.

(c) *Identification for improvement or corrective action.* If the SEA identifies an LEA for improvement or subjects the LEA to corrective action, the SEA must promptly provide to the parents of each student enrolled in a school served by the LEA—

(1) The reasons for the identification; and

(2) An explanation of how parents can participate in improving the LEA.

(d) *Information about action taken.* (1) The SEA must publish, and disseminate to the parents of each student enrolled in a school served by the LEA and to the public, information on any corrective action the SEA takes under § 200.53.

(2) The SEA must provide this information—

(i) In a uniform and understandable format, including alternative formats upon request; and

(ii) To the extent practicable, in a language that parents can understand.

(3) The SEA must disseminate the information through such means as the Internet, the media, and public agencies.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6316(c))

27. Add new §§ 200.52 and 200.53 and place them under the new undesignated center heading ''LEA and School Improvement'' in subpart A of part 200 to read as follows:

§ 200.52 LEA improvement.

(a) *Improvement plan.* (1) Not later than 3 months after an SEA has identified an LEA for improvement under § 200.50(d), the LEA must develop or revise an LEA improvement plan.

(2) The LEA must consult with parents, school staff, and others in developing or revising its improvement plan.

(3) The LEA improvement plan must—

(i) Incorporate strategies, grounded in scientifically based research, that will strengthen instruction in core academic subjects in schools served by the LEA;

(ii) Identify actions that have the greatest likelihood of improving the achievement of participating children in meeting the State's student academic achievement standards;

(iii) Address the professional development needs of the instructional staff serving the LEA by committing to spend for professional development not less than 10 percent of the funds received by the LEA under subpart A of this part for each fiscal year in which the SEA identifies the LEA for improvement. These funds—

(A) May include funds reserved by schools for professional development under § 200.41(c)(5); but

(B) May not include funds reserved for professional development under section 1119 of the ESEA;

(iv) Include specific measurable achievement goals and targets—

(A) For each of the groups of students under § 200.13(b)(7); and

(B) That are consistent with AYP as defined under §§ 200.13 through 200.20;

(v) Address—

(A) The fundamental teaching and learning needs in the schools of the LEA; and

(B) The specific academic problems of low-achieving students, including a determination of why the LEA's previous plan failed to bring about increased student academic achievement;

(vi) As appropriate, incorporate activities before school, after school, during the summer, and during any extension of the school year;

(vii) Specify the responsibilities of the SEA and LEA under the plan, including the technical assistance the SEA must provide under paragraph (b) of this section and the LEA's responsibilities under section 1120A of the ESEA; and

(viii) Include strategies to promote effective parental involvement in the schools served by the LEA.

(4) The LEA must implement the improvement plan—including any revised plan—expeditiously, but not later than the beginning of the school year following the year in which the LEA administered the assessments that resulted in the LEA's failure to make AYP for a second consecutive year and led to the SEA's identification of the LEA for improvement under § 200.50(d).

(b) *SEA technical assistance.* (1) An SEA that identifies an LEA for improvement under § 200.50(d) must, if requested, provide or arrange for the provision of technical or other assistance to the LEA, as authorized under section 1117 of the ESEA.

(2) The purpose of the technical assistance is to better enable the LEA to—

(i) Develop and implement its improvement plan; and

(ii) Work with schools needing improvement.

(3) The technical assistance provided by the SEA or an entity authorized by the SEA must—

(i) Be supported by effective methods and instructional strategies grounded in scientifically based research; and

(ii) Address problems, if any, in implementing the parental involvement and professional development activities described in sections 1118 and 1119, respectively, of the ESEA.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6316(c))

§ 200.53 LEA corrective action.

(a) *Definition.* For the purposes of this section, the term ''corrective action'' means action by an SEA that—

(1) Substantially and directly responds to—

(i) The consistent academic failure that caused the SEA to identify an LEA for corrective action; and

(ii) Any underlying staffing, curriculum, or other problems in the LEA;

(2) Is designed to meet the goal that each group of students described in § 200.13(b)(7) and enrolled in the LEA's schools will meet or exceed the State's proficient levels of achievement as measured by the State assessment system; and

(3) Is consistent with State law.

(b) *Notice and hearing.* Before implementing any corrective action under paragraph (c) of this section, the SEA must provide notice and a hearing to the affected LEA—if State law provides for this notice and hearing—not later than 45 days following the decision to take corrective action.

(c) *Requirements.* If the SEA identifies an LEA for corrective action, the SEA must do the following:

(1) Continue to make available technical assistance to the LEA.

(2) Take at least one of the following corrective actions:

(i) Defer programmatic funds or reduce administrative funds.

(ii) Institute and fully implement a new curriculum based on State and local content and academic achievement standards, including the provision of appropriate professional development for all relevant staff that—

(A) Is grounded in scientifically based research; and

(B) Offers substantial promise of improving educational achievement for low-achieving students.

(iii) Replace the LEA personnel who are relevant to the failure to make AYP.

(iv) Remove particular schools from the jurisdiction of the LEA and establish alternative arrangements for public governance and supervision of these schools.

(v) Appoint a receiver or trustee to administer the affairs of the LEA in place of the superintendent and school board.

(vi) Abolish or restructure the LEA.

(vii) In conjunction with at least one other action in paragraph (c)(2) of this section—

(A) Authorize students to transfer from a school operated by the LEA to a higher-performing public school operated by another LEA in accordance with § 200.44, and

(B) Provide to these students transportation, or the costs of transportation, to the other school consistent with § 200.44(h).

(Approved by the Office of Management and Budget under control number 1810–0516)

(Authority: 20 U.S.C. 6316(c)(10))

28. Place reserved § 200.54 under the undesignated center heading ''LEA and school improvement'' in subpart A of part 200.

29. Add a new undesignated center heading to subpart A of part 200 and place it after § 200.54 to read as follows:

Qualifications Of Teachers And Paraprofessionals

30. Add new §§ 200.55 through 200.59 and place them under the new undesignated center heading ''Qualifications of Teachers and Paraprofessionals'' in subpart A of part 200 to read as follows:

§ 200.55 Qualifications of teachers.

(a) *Newly hired teachers in Title I programs.* (1) An LEA must ensure that all teachers hired after the first day of the 2002–2003 school year who teach core academic subjects in a program supported with funds under subpart A of this part are highly qualified as defined in § 200.56.

(2) For the purpose of paragraph (a)(1) of this section, a teacher teaching in a program supported with funds under subpart A of this part is—

(i) A teacher in a targeted assisted school who is paid with funds under subpart A of this part;

(ii) A teacher in a schoolwide program school; or

(iii) A teacher employed by an LEA with funds under subpart A of this part to provide services to eligible private school students under § 200.62.

(b) *All teachers of core academic subjects.* (1) Not later than the end of the 2005–2006 school year, each State that receives funds under subpart A of this part, and each LEA in that State, must ensure that all public elementary and secondary school teachers in the State who teach core academic subjects, including teachers employed by an LEA to provide services to eligible private school students under § 200.62, are highly qualified as defined in § 200.56.

(2) A teacher who does not teach a core academic subject—such as some vocational education teachers—is not required to meet the requirements in § 200.56.

(c) *Definition.* The term ''core academic subjects'' means English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography.

(d) *Private school teachers.* The requirements in this section do not apply to teachers hired by private elementary and secondary schools.

(Authority: 20 U.S.C. 6319; 7801(11))

§ 200.56 Definition of ''highly qualified teacher.''

To be a ''highly qualified teacher,'' a teacher covered under § 200.55 must meet the requirements in paragraph (a) and either paragraph (b) or (c) of this section.

(a) *In general.* (1) Except as provided in paragraph (a)(3) of this section, a teacher covered under § 200.55 must—

(i) Have obtained full State certification as a teacher, which may include certification obtained through alternative routes to certification; or

(ii)(A) Have passed the State teacher licensing examination; and

(B) Hold a license to teach in the State.

(2) A teacher meets the requirement in paragraph (a)(1) of this section if the teacher—

(i) Has fulfilled the State's certification and licensure requirements applicable to the years of experience the teacher possesses; or

(ii) Is participating in an alternative route to certification program under which—

(A) The teacher—

(*1*) Receives high-quality professional development that is sustained, intensive, and classroom-focused in order to have a positive and lasting impact on classroom instruction, before and while teaching;

(*2*) Participates in a program of intensive supervision that consists of structured guidance and regular ongoing support for teachers or a teacher mentoring program;

(*3*) Assumes functions as a teacher only for a specified period of time not to exceed three years; and

(*4*) Demonstrates satisfactory progress toward full certification as prescribed by the State; and

(B) The State ensures, through its certification and licensure process, that the provisions in paragraph (a)(2)(ii) of this section are met.

(3) A teacher teaching in a public charter school in a State must meet the certification and licensure requirements, if any, contained in the State's charter school law.

(4) If a teacher has had certification or licensure requirements waived on an emergency, temporary, or provisional basis, the teacher is not highly qualified.

(b) *Teachers new to the profession.* A teacher covered under § 200.55 who is new to the profession also must—

(1) Hold at least a bachelor's degree; and

(2) At the public elementary school level, demonstrate, by passing a rigorous State test (which may consist of passing a State certification or licensing test), subject knowledge and teaching skills in reading/language arts, writing, mathematics, and other areas of the basic elementary school curriculum; or

(3) At the public middle and high school levels, demonstrate a high level of competency by—

(i) Passing a rigorous State test in each academic subject in which the teacher teaches (which may consist of passing a State certification or licensing test in each of these subjects); or

(ii) Successfully completing in each academic subject in which the teacher teaches—

(A) An undergraduate major;

(B) A graduate degree;

(C) Coursework equivalent to an undergraduate major; or

(D) Advanced certification or credentialing.

(c) *Teachers not new to the profession.* A teacher covered under § 200.55 who is not new to the profession also must—

(1) Hold at least a bachelor's degree; and

(2)(i) Meet the applicable requirements in paragraph (b)(2) or (3) of this section; or

(ii) Based on a high, objective, uniform State standard of evaluation in accordance with section 9101(23)(C)(ii) of the ESEA, demonstrate competency in each academic subject in which the teacher teaches.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 7801(23))

§ 200.57 Plans to increase teacher quality.

(a) *State plan.* (1) A State that receives funds under subpart A of this part must develop, as part of its State plan under section 1111 of the ESEA, a plan to ensure that all public elementary and secondary school teachers in the State who teach core academic subjects are highly qualified not later than the end of the 2005–2006 school year.

(2) The State's plan must—

(i) Establish annual measurable objectives for each LEA and school that include, at a minimum, an annual increase in the percentage of—

(A) Highly qualified teachers at each LEA and school; and

(B) Teachers who are receiving high-quality professional development to enable them to become highly qualified and effective classroom teachers;

(ii) Describe the strategies the State will use to—

(A) Help LEAs and schools meet the requirements in paragraph (a)(1) of this section; and

(B) Monitor the progress of LEAs and schools in meeting these requirements; and

(iii) Until the SEA fully complies with paragraph (a)(1) of this section, describe the specific steps the SEA will take to—

(A) Ensure that Title I schools provide instruction by highly qualified teachers, including steps that the SEA will take to ensure that minority children and children from low-income families are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers; and

(B) Evaluate and publicly report the progress of the SEA with respect to these steps.

(3) The State's plan may include other measures that the State determines are appropriate to increase teacher qualifications.

(b) *Local plan.* An LEA that receives funds under subpart A of this part must develop, as part of its local plan under section 1112 of the ESEA, a plan to ensure that—

(1) All public elementary and secondary school teachers in the LEA who teach core academic subjects, including teachers employed by the

LEA to provide services to eligible private school students under § 200.62, are highly qualified not later than the end of the 2005–2006 school year; and

(2) Through incentives for voluntary transfers, professional development, recruitment programs, or other effective strategies, minority students and students from low-income families are not taught at higher rates than other students by unqualified, out-of-field, or inexperienced teachers.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6311(b)(8)(C), 6312(c)(1)(I), (L); 6319(a)(2)–(3); 7801(34))

§ 200.58 Qualifications of paraprofessionals.

(a) *Applicability.* (1) An LEA must ensure that each paraprofessional who is hired by the LEA and who works in a program supported with funds under subpart A of this part meets the requirements in paragraph (b) of this section and, except as provided in paragraph (e) of this section, the requirements in either paragraph (c) or (d) of this section.

(2) For the purpose of this section, the term ''paraprofessional''—

(i) Means an individual who provides instructional support consistent with § 200.59; and

(ii) Does not include individuals who have only non-instructional duties (such as providing technical support for computers, providing personal care services, or performing clerical duties).

(3) For the purpose of paragraph (a) of this section, a paraprofessional working in ''a program supported with funds under subpart A of this part'' is—

(i) A paraprofessional in a targeted assisted school who is paid with funds under subpart A of this part;

(ii) A paraprofessional in a schoolwide program school; or

(iii) A paraprofessional employed by an LEA with funds under subpart A of this part to provide instructional support to a public school teacher covered under § 200.55 who provides equitable services to eligible private school students under § 200.62.

(b) *All paraprofessionals.* A paraprofessional covered under paragraph (a) of this section, regardless of the paraprofessional's hiring date, must have earned a secondary school diploma or its recognized equivalent.

(c) *New paraprofessionals.* A paraprofessional covered under paragraph (a) of this section who is hired after January 8, 2002 must have—

(1) Completed at least two years of study at an institution of higher education;

(2) Obtained an associate's or higher degree; or

(3)(i) Met a rigorous standard of quality, and can demonstrate—through a formal State or local academic assessment—knowledge of, and the ability to assist in instructing, as appropriate—

(A) Reading/language arts, writing, and mathematics; or

(B) Reading readiness, writing readiness, and mathematics readiness.

(ii) A secondary school diploma or its recognized equivalent is necessary, but not sufficient, to meet the requirement in paragraph (c)(3)(i) of this section.

(d) *Existing paraprofessionals.* Each paraprofessional who was hired on or before January 8, 2002 must meet the requirements in paragraph (c) of this section no later than January 8, 2006.

(e) *Exceptions.* A paraprofessional does not need to meet the requirements in paragraph (c) or (d) of this section if the paraprofessional—

(1)(i) Is proficient in English and a language other than English; and

(ii) Acts as a translator to enhance the participation of limited English proficient children under subpart A of this part; or

(2) Has instructional-support duties that consist solely of conducting parental involvement activities.

(Authority: 20 U.S.C. 6319(c)–(f))

§ 200.59 Duties of paraprofessionals.

(a) A paraprofessional covered under § 200.58 may not be assigned a duty inconsistent with paragraph (b) of this section.

(b) A paraprofessional covered under § 200.58 may perform the following instructional support duties:

(1) One-on-one tutoring for eligible students if the tutoring is scheduled at a time when a student would not otherwise receive instruction from a teacher.

(2) Assisting in classroom management.

(3) Assisting in computer instruction.

(4) Conducting parent involvement activities.

(5) Providing instructional support in a library or media center.

(6) Acting as a translator.

(7) Providing instructional support services.

(c)(1) A paraprofessional may not provide instructional support to a student unless the paraprofessional is working under the direct supervision of a teacher who meets the requirements in § 200.56.

(2) A paraprofessional works under the direct supervision of a teacher if—

(i) The teacher plans the instructional activities that the paraprofessional carries out;

(ii) The teacher evaluates the achievement of the students with whom the paraprofessional is working; and

(iii) The paraprofessional works in close and frequent physical proximity to the teacher.

(d) A paraprofessional may assume limited duties that are assigned to similar personnel who are not working in a program supported with funds under subpart A of this part—including non-instructional duties and duties that do not benefit participating students—if the amount of time the paraprofessional spends on those duties is the same proportion of total work time as the time spent by similar personnel at the same school.

(Authority: 20 U.S.C. 6319(g))

31. Revise §§ 200.60 and 200.61 and place them under the new undesignated center heading ''Qualifications of Teachers and Paraprofessionals'' in subpart A of part 200 to read as follows:

§ 200.60 Expenditures for professional development.

(a)(1) Except as provided in paragraph (a)(2) of this section, an LEA must use funds it receives under subpart A of this part as follows for professional development activities to ensure that teachers and paraprofessionals meet the requirements of §§ 200.56 and 200.58:

(i) For each of fiscal years 2002 and 2003, the LEA must use not less than 5 percent or more than 10 percent of the funds it receives under subpart A of this part.

(ii) For each fiscal year after 2003, the LEA must use not less than 5 percent of the funds it receives under subpart A of this part.

(2) An LEA is not required to spend the amount required in paragraph (a)(1) of this section for a given fiscal year if a lesser amount is sufficient to ensure that the LEA's teachers and paraprofessionals meet the requirements in §§ 200.56 and 200.58, respectively.

(b) The LEA may use additional funds under subpart A of this part to support ongoing training and professional development, as defined in section 9101(34) of the ESEA, to assist teachers and paraprofessionals in carrying out activities under subpart A of this part.

(Authority: 20 U.S.C. 6319(h), (l); 7801(34))

§ 200.61 Parents' right to know.

(a) At the beginning of each school year, an LEA that receives funds under subpart A of this part must notify the parents of each student attending a Title I school that the parents may request, and the LEA will provide the parents on request, information regarding the professional qualifications of the

student's classroom teachers, including, at a minimum, the following:

(1) Whether the teacher has met State qualification and licensing criteria for the grade levels and subject areas in which the teacher provides instruction.

(2) Whether the teacher is teaching under emergency or other provisional status through which State qualification or licensing criteria have been waived.

(3) The baccalaureate degree major of the teacher and any other graduate certification or degree held by the teacher, and the field of discipline of the certification or degree.

(4) Whether the child is provided services by paraprofessionals and, if so, their qualifications.

(b) A school that participates under subpart A of this part must provide to each parent—

(1) Information on the level of achievement of the parent's child in each of the State academic assessments required under § 200.2;

(2) Timely notice that the parent's child has been assigned, or has been taught for four or more consecutive weeks by, a teacher of a core academic subject who is not highly qualified.

(c) An LEA and school must provide the notice and information required under this section—

(1) In a uniform and understandable format, including alternative formats upon request; and

(2) To the extent practicable, in a language that parents can understand.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6311(h)(6))

32. Add a new undesignated center heading to subpart A of part 200 and place it after § 200.61 to read as follows:

Participation of Eligible Children in Private Schools

33. Add § 200.62 and place it under the undesignated center heading ''Participation of Eligible Children in Private Schools'' in subpart A of part 200 to read as follows:

§ 200.62 Responsibilities for providing services to private school children.

(a) After timely and meaningful consultation with appropriate officials of private schools, an LEA must—

(1) In accordance with §§ 200.62 through 200.67 and section 1120 of the ESEA, provide special educational services or other benefits under subpart A of this part, on an equitable basis and in a timely manner, to eligible children who are enrolled in private elementary and secondary schools; and

(2) Ensure that teachers and families of participating private school children participate on a basis equitable to the participation of teachers and families of public school children receiving these services in accordance with § 200.65.

(b)(1) Eligible private school children are children who—

(i) Reside in participating public school attendance areas of the LEA, regardless of whether the private school they attend is located in the LEA; and

(ii) Meet the criteria in section 1115(b) of the ESEA.

(2) Among the eligible private school children, the LEA must select children to participate, consistent with § 200.64.

(c) The services and other benefits an LEA provides under this section must be secular, neutral and nonideological.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6315(b); 6320(a))

34. Revise § 200.63 and place it under the undesignated center heading ''Participation of Eligible Children in Private Schools'' in subpart A of part 200 to read as follows:

§ 200.63 Consultation.

(a) In order to have timely and meaningful consultation, an LEA must consult with appropriate officials of private schools during the design and development of the LEA's program for eligible private school children.

(b) At a minimum, the LEA must consult on the following:

(1) How the LEA will identify the needs of eligible private school children.

(2) What services the LEA will offer to eligible private school children.

(3) How and when the LEA will make decisions about the delivery of services.

(4) How, where, and by whom the LEA will provide services to eligible private school children.

(5) How the LEA will assess academically the services to eligible private school children in accordance with § 200.10, and how the LEA will use the results of that assessment to improve Title I services.

(6) The size and scope of the equitable services that the LEA will provide to eligible private school children, and, consistent with § 200.64, the proportion of funds that the LEA will allocate for these services.

(7) The method or sources of data that the LEA will use under § 200.78 to determine the number of private school children from low-income families residing in participating public school attendance areas, including whether the LEA will extrapolate data if a survey is used.

(8) The equitable services the LEA will provide to teachers and families of participating private school children.

(c)(1) Consultation by the LEA must—

(i) Include meetings of the LEA and appropriate officials of the private schools; and

(ii) Occur before the LEA makes any decision that affects the opportunity of eligible private school children to participate in Title I programs.

(2) The LEA must meet with officials of the private schools throughout the implementation and assessment of the Title I services.

(d)(1) Consultation must include—

(i) A discussion of service delivery mechanisms the LEA can use to provide equitable services to eligible private school children; and

(ii) A thorough consideration and analysis of the views of the officials of the private schools on the provision of services through a contract with a third-party provider.

(2) If the LEA disagrees with the views of the officials of the private schools on the provision of services through a contract, the LEA must provide in writing to the officials of the private schools the reasons why the LEA chooses not to use a contractor.

(e)(1) The LEA must maintain in its records and provide to the SEA a written affirmation, signed by officials of each private school with participating children or appropriate private school representatives, that the required consultation has occurred.

(2) If the officials of the private schools do not provide the affirmations within a reasonable period of time, the LEA must submit to the SEA documentation that the required consultation occurred.

(f) An official of a private school has the right to complain to the SEA that the LEA did not—

(1) Engage in timely and meaningful consultation; or

(2) Consider the views of the official of the private school.

(Approved by the Office of Management and Budget under control number 1810–0581)

(Authority: 20 U.S.C. 6320(b))

35. Add § 200.64 and place it under the undesignated center heading ''Participation of Eligible Children in Private Schools'' in subpart A of part 200 to read as follows:

§ 200.64 Factors for determining equitable participation of private school children.

(a) *Equal expenditures.* (1) Funds expended by an LEA under subpart A of this part for services for eligible private school children in the aggregate must be equal to the amount of funds generated by private school children from low-income families under paragraph (a)(2) of this section.

(2) An LEA must meet this requirement as follows:

(i)(A) If the LEA reserves funds under § 200.77 to provide instructional and related activities for public elementary or secondary school students at the district level, the LEA must also provide from those funds, as applicable, equitable services to eligible private school children.

(B) The amount of funds available to provide equitable services from the applicable reserved funds must be proportionate to the number of private school children from low-income families residing in participating public school attendance areas.

(ii) The LEA must reserve the funds generated by private school children under § 200.78 and, in consultation with appropriate officials of the private schools, may—

(A) Combine those amounts, along with funds under paragraph (a)(2)(i) of this section, if appropriate, to create a pool of funds from which the LEA provides equitable services to eligible private school children, in the aggregate, in greatest need of those services; or

(B) Provide equitable services to eligible children in each private school with the funds generated by children from low-income families under § 200.78 who attend that private school.

(b) *Services on an equitable basis.* (1) The services that an LEA provides to eligible private school children must be equitable in comparison to the services and other benefits that the LEA provides to public school children participating under subpart A of this part.

(2) Services are equitable if the LEA—

(i) Addresses and assesses the specific needs and educational progress of eligible private school children on a comparable basis as public school children;

(ii) Meets the equal expenditure requirements under paragraph (a) of section; and

(iii) Provides private school children with an opportunity to participate that—

(A) Is equitable to the opportunity provided to public school children; and

(B) Provides reasonable promise of the private school children achieving the high levels called for by the State's student academic achievement standards or equivalent standards applicable to the private school children.

(3)(i) The LEA may provide services to eligible private school children either directly or through arrangements with another LEA or a third-party provider.

(ii) If the LEA contracts with a third-party provider—

(A) The provider must be independent of the private school and of any religious organization; and

(B) The contract must be under the control and supervision of the LEA.

(4) After timely and meaningful consultation under § 200.63, the LEA must make the final decisions with respect to the services it will provide to eligible private school children.

(Authority: 20 U.S.C. 6320)

36. Revise § 200.65 and place it under the undesignated center heading ''Participation of Eligible Children in Private Schools'' in subpart A of part 200 to read as follows:

§ 200.65 Determining equitable participation of teachers and families of participating private school children.

(a)(1) From applicable funds reserved for parent involvement and professional development under § 200.77, an LEA shall ensure that teachers and families of participating private school children participate on an equitable basis in professional development and parent involvement activities, respectively.

(2) The amount of funds available to provide equitable services from the applicable reserved funds must be proportionate to the number of private school children from low-income families residing in participating public school attendance areas.

(b) After consultation with appropriate officials of the private schools, the LEA must conduct professional development and parent involvement activities for the teachers and families of participating private school children either—

(1) In conjunction with the LEA's professional development and parent involvement activities; or

(2) Independently.

(c) Private school teachers are not covered by the requirements in § 200.56.

(Authority: 20 U.S.C. 6320(a))

37. Add new §§ 200.66 and 200.67 and place them under the undesignated center heading ''Participation of Eligible Children in Private Schools'' in subpart A of part 200 to read as follows:

§ 200.66 Requirements to ensure that funds do not benefit a private school.

(a) An LEA must use funds under subpart A of this part to provide services that supplement, and in no case supplant, the services that would, in the absence of Title I services, be available to participating private school children.

(b)(1) The LEA must use funds under subpart A of this part to meet the special educational needs of participating private school children.

(2) The LEA may not use funds under subpart A of this part for—

(i) The needs of the private school; or

(ii) The general needs of children in the private school.

(Authority: 20 U.S.C. 6320(a), 6321(b))

§ 200.67 Requirements concerning property, equipment, and supplies for the benefit of private school children.

(a) The LEA must keep title to and exercise continuing administrative control of all property, equipment, and supplies that the LEA acquires with funds under subpart A of this part for the benefit of eligible private school children.

(b) The LEA may place equipment and supplies in a private school for the period of time needed for the program.

(c) The LEA must ensure that the equipment and supplies placed in a private school—

(1) Are used only for Title I purposes; and

(2) Can be removed from the private school without remodeling the private school facility.

(d) The LEA must remove equipment and supplies from a private school if—

(1) The LEA no longer needs the equipment and supplies to provide Title I services; or

(2) Removal is necessary to avoid unauthorized use of the equipment or supplies for other than Title I purposes.

(e) The LEA may not use funds under subpart A of this part for repairs, minor remodeling, or construction of private school facilities.

(Authority: 20 U.S.C. 6320(d))

38. Place reserved §§ 200.68 and 200.69 under the undesignated center heading ''Participation of Eligible Children in Private Schools'' in subpart A of part 200.

39. Add a new undesignated center heading to subpart A of part 200 and place it after reserved § 200.69 to read as follows:

Allocations To LEAS

40. Add new §§ 200.70 through 200.75 and place them under the undesignated center heading ''Allocations to LEAs'' in subpart A of part 200 to read as follows:

§ 200.70 Allocation of funds to LEAs in general.

(a) The Secretary allocates basic grants, concentration grants, targeted grants, and education finance incentive grants, through SEAs, to each eligible LEA for which the Bureau of the Census has provided data on the number of children from low-income families residing in the school attendance areas

of the LEA (hereinafter referred to as the ''Census list'').

(b) In establishing eligibility and allocating funds under paragraph (a) of this section, the Secretary counts children ages 5 to 17, inclusive (hereinafter referred to as ''formula children'')—

(1) From families below the poverty level based on the most recent satisfactory data available from the Bureau of the Census;

(2) From families above the poverty level receiving assistance under the Temporary Assistance for Needy Families program under Title IV of the Social Security Act;

(3) Being supported in foster homes with public funds; and

(4) Residing in local institutions for neglected children.

(c) Except as provided in §§ 200.72, 200.75, and 200.100, an SEA may not change the Secretary's allocation to any LEA that serves an area with a total census population of at least 20,000 persons.

(d) In accordance with § 200.74, an SEA may use an alternative method, approved by the Secretary, to distribute the State's share of basic grants, concentration grants, targeted grants, and education finance incentive grants to LEAs that serve an area with a total census population of less than 20,000 persons.

(Approved by the Office of Management and Budget under control numbers 1810–0620 and 1810–0622)

(Authority: 20 U.S.C. 6333–6337)

§ 200.71 LEA eligibility.

(a) *Basic grants.* An LEA is eligible for a basic grant if the number of formula children is—

(1) At least 10; and

(2) Greater than two percent of the LEA's total population ages 5 to 17 years, inclusive.

(b) *Concentration grants.* An LEA is eligible for a concentration grant if—

(1) The LEA is eligible for a basic grant under paragraph (a) of this section; and

(2) The number of formula children exceeds—

(i) 6,500; or

(ii) 15 percent of the LEA's total population ages 5 to 17 years, inclusive.

(c) *Targeted grants.* An LEA is eligible for a targeted grant if the number of formula children is—

(1) At least 10; and

(2) At least five percent of the LEA's total population ages 5 to 17 years, inclusive.

(d) *Education finance incentive grants.* An LEA is eligible for an education finance incentive grant if the number of formula children is—

(1) At least 10; and

(2) At least five percent of the LEA's total population ages 5 to 17 years, inclusive.

(Approved by the Office of Management and Budget under control numbers 1810–0620 and 1810–0622)

(Authority: 20 U.S.C. 6333–6337)

§ 200.72 Procedures for adjusting allocations determined by the Secretary to account for eligible LEAs not on the Census list.

(a) *General.* For each LEA not on the Census list (hereinafter referred to as a ''new'' LEA), an SEA must determine the number of formula children and the number of children ages 5 to 17, inclusive, in that LEA.

(b) *Determining LEA eligibility.* An SEA must determine basic grant, concentration grant, targeted grant, and education finance incentive grant eligibility for each new LEA and re-determine eligibility for the LEAs on the Census list, as appropriate, based on the number of formula children and children ages 5 to 17, inclusive, determined in paragraph (a) of this section.

(c) *Adjusting LEA allocations.* An SEA must adjust the LEA allocations calculated by the Secretary to determine allocations for eligible new LEAs based on the number of formula children determined in paragraph (a) of this section.

(Approved by the Office of Management and Budget under control numbers 1810–0620 and 1810–0622)

(Authority: 20 U.S.C. 6333–6337)

§ 200.73 Applicable hold-harmless provisions.

(a) *General.* (1) Except as authorized under paragraph (c) of this section and § 200.100(d)(2), an SEA may not reduce the allocation of an eligible LEA below the hold-harmless amounts established under paragraph (a)(4) of this section.

(2) The hold-harmless protection limits the maximum reduction of an LEA's allocation compared to the LEA's allocation for the preceding year.

(3) Except as provided in § 200.100(d), an SEA must apply the hold-harmless requirement separately for basic grants, concentration grants, targeted grants, and education finance incentive grants as described in paragraph (a)(4) of this section.

(4) Under section 1122(c) of the ESEA, the hold-harmless percentage varies based on the LEA's proportion of formula children, as shown in the following table:

LEA's number of formula children ages 5 to 17, inclusive, as a percentage of its total population of children ages 5 to 17, inclusive	Hold-harmless percentage	Applicable grant formulas
(i) 30% or more	95	Basic Grants, Concentration Grants, Targeted Grants, and Education Finance Incentive Grants.
(ii) 15% or more but less than 30%	90	
(iii) Less than 15%	85	

(b) *Targeted grants and education finance incentive grants.* The number of formula children used to determine the hold-harmless percentage is the number before applying the weights described in section 1125 and section 1125A of the ESEA.

(c) *Adjustment for insufficient funds.* If the amounts made available to the State are insufficient to pay the full amount that each LEA is eligible to receive under paragraph (a)(4) of this section, the SEA must ratably reduce the allocations for all LEAs in the State to the amount available.

(d) *Eligibility for hold-harmless protection.* (1) An LEA must meet the eligibility requirements for a basic grant, targeted grant, or education finance incentive grant under § 200.71 in order for the applicable hold-harmless provision to apply.

(2) An LEA not meeting the eligibility requirements for a concentration grant under § 200.71 must be paid its hold-harmless amount for four consecutive years.

(Approved by the Office of Management and Budget under control numbers 1810–0620 and 1810–0622)

(Authority: 20 U.S.C. 6332(c))

§ 200.74 Use of an alternative method to distribute grants to LEAs with fewer than 20,000 total residents.

(a) For eligible LEAs serving an area with a total census population of less than 20,000 persons (hereinafter

referred to as ''small LEAs''), an SEA may apply to the Secretary to use an alternative method to distribute basic grant, concentration grant, targeted grant, and education finance incentive grant funds.

(b) In its application, the SEA must—

(1) Identify the alternative data it proposes to use; and

(2) Assure that it has established a procedure through which a small LEA that is dissatisfied with the determination of its grant may appeal directly to the Secretary.

(c) The SEA must base its alternative method on population data that best reflect the current distribution of children from low-income families among the State's small LEAs and use the same poverty measure consistently for small LEAs across the State for all Title I, part A programs.

(d) Based on the alternative poverty data selected, the SEA must—

(1) Re-determine eligibility of its small LEAs for basic grants, concentration grants, targeted grants, and education finance incentive grants in accordance with § 200.71;

(2) Calculate allocations for small LEAs in accordance with the provisions of sections 1124, 1124A, 1125, and 1125A of the ESEA, as applicable; and

(3) Ensure that each LEA receives the hold-harmless amount to which it is entitled under § 200.73.

(e) The amount of funds available for redistribution under each formula is the separate amount determined by the Secretary under sections 1124, 1124A, 1125, and 1125A of the ESEA for eligible small LEAs after the SEA has made the adjustments required under § 200.72(c).

(f) If the amount available for redistribution to small LEAs under an alternative method is not sufficient to satisfy applicable hold-harmless requirements, the SEA must ratably reduce all eligible small LEAs to the amount available.

(Approved by the Office of Management and Budget under control numbers 1810–0620 and 1810–0622)

(Authority: 20 U.S.C. 6333–6337)

§ 200.75 Special procedures for allocating concentration grant funds in small States.

(a) In a State in which the number of formula children is less than 0.25 percent of the national total on January 8, 2002 (hereinafter referred to as a ''small State''), an SEA may either—

(1) Allocate concentration grants among eligible LEAs in the State in accordance with §§ 200.72 through 200.74, as applicable; or

(2) Without regard to the allocations determined by the Secretary—

(i) Identify those LEAs in which the number or percentage of formula children exceeds the statewide average number or percentage of those children; and

(ii) Allocate concentration grant funds, consistent with § 200.73, among the LEAs identified in paragraph (a)(2)(i) of this section based on the number of formula children in each of those LEAs.

(b) If the SEA in a small State uses an alternative method under § 200.74, the SEA must use the poverty data approved under the alternative method to identify those LEAs with numbers or percentages of formula children that exceed the statewide average number or percentage of those children for the State as a whole.

(Approved by the Office of Management and Budget under control numbers 1810–0620 and 1810–0622)

(Authority: 20 U.S.C. 6334(b))

41. Add and reserve new § 200.76 and place it under the revised undesignated center heading ''Allocations to LEAs'' in subpart A of part 200.

42. Add a new undesignated center heading to subpart A of part 200 and place it after § 200.76 to read as follows:

Procedures for the Within-District Allocation of LEA Program Funds

43. Add new §§ 200.77 and 200.78 and place them under the undesignated center heading ''Procedures for the Within-District Allocation of LEA Program Funds'' in subpart A of part 200 to read as follows:

§ 200.77 Reservation of funds by an LEA.

Before allocating funds in accordance with § 200.78, an LEA must reserve funds as are reasonable and necessary to—

(a) Provide services comparable to those provided to children in participating school attendance areas and schools to serve—

(1) Homeless children who do not attend participating schools, including providing educationally related support services to children in shelters and other locations where homeless children may live;

(2) Children in local institutions for neglected children; and

(3) If appropriate—

(i) Children in local institutions for delinquent children; and

(ii) Neglected and delinquent children in community-day school programs;

(b) Provide, where appropriate under section 1113(c)(4) of the ESEA, financial incentives and rewards to teachers who serve students in Title I schools identified for school improvement, corrective action, and restructuring for the purpose of attracting and retaining qualified and effective teachers;

(c) Meet the requirements for choice-related transportation and supplemental educational services in § 200.48, unless the LEA meets these requirements with non-Title I funds;

(d) Address the professional development needs of instructional staff, including—

(1) Professional development requirements under § 200.52(a)(3)(iii) if the LEA has been identified for improvement or corrective action; and

(2) Professional development expenditure requirements under § 200.60;

(e) Meet the requirements for parental involvement in section 1118(a)(3) of the ESEA;

(f) Administer programs for public and private school children under this part, including special capital expenses, if any, incurred in providing services to eligible private school children, such as—

(1) The purchase and lease of real and personal property (including mobile educational units and neutral sites);

(2) Insurance and maintenance costs;

(3) Transportation; and

(4) Other comparable goods and services, including non-instructional computer technicians; and

(g) Conduct other authorized activities, such as school improvement and coordinated services.

(Authority: 20 U.S.C. 6313(c)(3) and (4), 6316(b)(10), (c)(7)(iii), 6318(a)(3), 6319(l), 6320, 7279d)

§ 200.78 Allocation of funds to school attendance areas and schools.

(a)(1) An LEA must allocate funds under subpart A of this part to school attendance areas and schools, identified as eligible and selected to participate under section 1113(a) or (b) of the ESEA, in rank order on the basis of the total number of children from low-income families in each area or school.

(2)(i) In calculating the total number of children from low-income families, the LEA must include children from low-income families who attend private schools.

(ii) To obtain a count of private school children, the LEA may—

(A) Use the same poverty data the LEA uses to count public school children;

(B)(*1*) Use comparable poverty data from a survey of families of private school students that, to the extent possible, protects the families' identity; and

(*2*) Extrapolate data from the survey based on a representative sample if complete actual data are unavailable;

(C) Use comparable poverty data from a different source, such as scholarship applications;

(D) Apply the low-income percentage of each participating public school attendance area to the number of private school children who reside in that school attendance area; or

(E) Use an equated measure of low income correlated with the measure of low income used to count public school children.

(iii) An LEA may count private school children from low-income families every year or every two years.

(iv) After timely and meaningful consultation in accordance with § 200.63, the LEA shall have the final authority in determining the method used to calculate the number of private school children from low-income families;

(3) If an LEA ranks its school attendance areas and schools by grade span groupings, the LEA may determine the percentage of children from low-income families in the LEA as a whole or for each grade span grouping.

(b)(1) Except as provided in paragraphs (b)(2) and (d) of this section, an LEA must allocate to each participating school attendance area or school an amount for each low-income child that is at least 125 percent of the per-pupil amount of funds the LEA received for that year under part A, subpart 2 of Title I. The LEA must calculate this per-pupil amount before it reserves funds under § 200.77, using the poverty measure selected by the LEA under section 1113(a)(5) of the ESEA.

(2) If an LEA is serving only school attendance areas or schools in which the percentage of children from low-income families is 35 percent or more, the LEA is not required to allocate a per-pupil amount of at least 125 percent.

(c) An LEA is not required to allocate the same per-pupil amount to each participating school attendance area or school provided the LEA allocates higher per-pupil amounts to areas or schools with higher concentrations of poverty than to areas or schools with lower concentrations of poverty.

(d) An LEA may reduce the amount of funds allocated under this section to a school attendance area or school if the area or school is spending supplemental State or local funds for programs that meet the requirements in § 200.79(b).

(e) If an LEA contains two or more counties in their entirety, the LEA must distribute to schools within each county a share of the LEA's total grant that is no less than the county's share of the child count used to calculate the LEA's grant.

(Authority: 20 U.S.C. 6313(c), 6320(a) and (c)(1), 6333(c)(2))

44. Add a new undesignated center heading to subpart A of part 200 and place it after new § 200.78 to read as follows:

Fiscal Requirements

45. Add new § 200.79 and place it under the new undesignated center heading ''Fiscal Requirements'' in subpart A of part 200 to read as follows:

§ 200.79 Exclusion of supplemental State and local funds from supplement, not supplant and comparability determinations.

(a) For the purpose of determining compliance with the supplement not supplant requirement in section 1120A(b) and the comparability requirement in section 1120A(c) of the ESEA, a grantee or subgrantee under subpart A of this part may exclude supplemental State and local funds spent in any school attendance area or school for programs that meet the intent and purposes of Title I.

(b) A program meets the intent and purposes of Title I if the program either—

(1)(i) Is implemented in a school in which the percentage of children from low-income families is at least 40 percent;

(ii) Is designed to promote schoolwide reform and upgrade the entire educational operation of the school to support students in their achievement toward meeting the State's challenging academic achievement standards that all students are expected to meet;

(iii) Is designed to meet the educational needs of all students in the school, particularly the needs of students who are failing, or most at risk of failing, to meet the State's challenging student academic achievement standards; and

(iv) Uses the State's assessment system under § 200.2 to review the effectiveness of the program; or

(2)(i) Serves only students who are failing, or most at risk of failing, to meet the State's challenging student academic achievement standards;

(ii) Provides supplementary services designed to meet the special educational needs of the students who are participating in the program to support their achievement toward meeting the State's student academic achievement standards; and

(iii) Uses the State's assessment system under § 200.2 to review the effectiveness of the program.

(c) The conditions in paragraph (b) of this section also apply to supplemental State and local funds expended under section 1113(b)(1)(D) and 1113(c)(2)(B) of the ESEA.

(Authority: 20 U.S.C. 6321(b)–(d))

46. Revise subpart B of part 200 to read as follows:

Subpart B—Even Start Family Literacy Programs

Sec.
200.80 Migrant Education Even Start Program definition.

Subpart B—Even Start Family Literacy Programs

§ 200.80 Migrant Education Even Start Program definition.

Eligible participants under the Migrant Education Even Start Program (MEES) must meet the definitions of a migratory child, a migratory agricultural worker, or a migratory fisher in § 200.81.

(Authority: 20 U.S.C. 6381a and 20 U.S.C. 6399)

47. Revise subpart C of part 200 to read as follows:

Subpart C—Migrant Education Program

Sec.
200.81 Program definitions.
200.82 Use of program funds for unique program function costs.
200.83 Responsibilities of SEAs to implement projects through a comprehensive needs assessment and a comprehensive State plan for service delivery.
200.84 Responsibilities of SEAs for evaluating the effectiveness of the MEP.
200.85 Responsibilities of SEAs and operating agencies for improving services to migratory children.
200.86 Use of MEP funds in schoolwide projects.
200.87 Responsibilities for participation of children in private schools.
200.88 Exclusion of supplemental State and local funds from supplement, not supplant and comparability determinations.
200.89 [Reserved]

Subpart C—Migrant Education Program

§ 200.81 Program definitions.

The following definitions apply to programs and projects operated under subpart C of this part:

(a) *Agricultural activity* means—

(1) Any activity directly related to the production or processing of crops, dairy products, poultry or livestock for initial commercial sale or personal subsistence;

(2) Any activity directly related to the cultivation or harvesting of trees; or

(3) Any activity directly related to fish farms.

(b) *Fishing activity* means any activity directly related to the catching or

processing of fish or shellfish for initial commercial sale or personal subsistence.

(c) *Migratory agricultural worker* means a person who, in the preceding 36 months, has moved from one school district to another, or from one administrative area to another within a State that is comprised of a single school district, in order to obtain temporary or seasonal employment in agricultural activities (including dairy work) as a principal means of livelihood.

(d) *Migratory child* means a child who is, or whose parent, spouse, or guardian is, a migratory agricultural worker, including a migratory dairy worker, or a migratory fisher, and who, in the preceding 36 months, in order to obtain, or accompany such parent, spouse, guardian in order to obtain, temporary or seasonal employment in agricultural or fishing work—

(1) Has moved from one school district to another;

(2) In a State that is comprised of a single school district, has moved from one administrative area to another within such district; or

(3) Resides in a school district of more than 15,000 square miles, and migrates a distance of 20 miles or more to a temporary residence to engage in a fishing activity.

(e) *Migratory fisher* means a person who, in the preceding 36 months, has moved from one school district to another, or from one administrative area to another within a State that is comprised of a single school district, in order to obtain temporary or seasonal employment in fishing activities as a principal means of livelihood. This definition also includes a person who, in the preceding 36 months, resided in a school district of more than 15,000 square miles, and moved a distance of 20 miles or more to a temporary residence to engage in a fishing activity as a principal means of livelihood.

(f) *Principal means of livelihood* means that temporary or seasonal agricultural or fishing activity plays an important part in providing a living for the worker and his or her family.

(Authority: 20 U.S.C. 6391–6399, 6571)

§ 200.82 Use of program funds for unique program function costs.

An SEA may use the funds available from its State Migrant Education Program (MEP) to carry out other administrative activities, beyond those allowable under § 200.101, that are unique to the MEP, including those that are the same or similar to administrative activities performed by LEAs in the State under subpart A of this part. These activities include but are not limited to—

(a) Statewide identification and recruitment of eligible migratory children;

(b) Interstate and intrastate coordination of the State MEP and its local projects with other relevant programs and local projects in the State and in other States;

(c) Procedures for providing for educational continuity for migratory children through the timely transfer of educational and health records, beyond that required generally by State and local agencies;

(d) Collecting and using information for accurate distribution of subgrant funds;

(e) Development of a statewide needs assessment and a comprehensive State plan for MEP service delivery;

(f) Supervision of instructional and support staff;

(g) Establishment and implementation of a State parent advisory council; and

(h) Conducting an evaluation of the effectiveness of the State MEP.

(Authority: 20 U.S.C. 6392, 6571)

§ 200.83 Responsibilities of SEAs to implement projects through a comprehensive needs assessment and a comprehensive State plan for service delivery.

(a) An SEA that receives a grant of MEP funds must develop and update a written comprehensive State plan (based on a current statewide needs assessment) that, at a minimum, has the following components:

(1) *Performance targets.* The plan must specify—

(i) Performance targets that the State has adopted for all children in reading and mathematics achievement, high school graduation, and the number of school dropouts, as well as the State's performance targets, if any, for school readiness; and

(ii) Any other performance targets that the State has identified for migratory children.

(2) *Needs assessment.* The plan must include an identification and assessment of—

(i) The unique educational needs of migratory children that result from the children's migratory lifestyle; and

(ii) Other needs of migratory students that must be met in order for migratory children to participate effectively in school.

(3) *Service delivery.* The plan must describe the strategies that the SEA will pursue on a statewide basis to achieve the performance targets in paragraph (a)(1) of this section by addressing—

(i) The unique educational needs of migratory children consistent with paragraph (a)(2)(i) of this section; and

(ii) Other needs of migratory children consistent with paragraph (a)(2)(ii) of this section.

(4) *Evaluation.* The plan must describe how the State will evaluate the effectiveness of its program.

(b) The SEA must develop its comprehensive State plan in consultation with the State parent advisory council or, for SEAs not operating programs for one school year in duration, in consultation with the parents of migratory children. This consultation must be in a format and language that the parents understand.

(c) Each SEA receiving MEP funds must ensure that its local operating agencies comply with the comprehensive State plan.

(Approved by the Office of Management and Budget under control number 1810–0659)

(Authority: 20 U.S.C. 6396)

§ 200.84 Responsibilities of SEAs for evaluating the effectiveness of the MEP.

Each SEA must determine the effectiveness of its program through a written evaluation that measures the implementation and results achieved by the program against the State's performance targets in § 200.83(a)(1), particularly for those students who have priority for service as defined in section 1304(d) of the ESEA.

(Approved by the Office of Management and Budget under control number 1810–0659)

(Authority: 20 U.S.C. 6394)

§ 200.85 Responsibilities of SEAs and operating agencies for improving services to migratory children.

While the specific school improvement requirements of section 1116 of the ESEA do not apply to the MEP, SEAs and local operating agencies receiving MEP funds must use the results of the evaluation carried out under § 200.84 to improve the services provided to migratory children.

(Authority: 20 U.S.C. 6394)

§ 200.86 Use of MEP funds in schoolwide projects.

Funds available under part C of Title I of the ESEA may be used in a schoolwide program subject to the requirements of § 200.28(c)(3)(i).

(Authority: 20 U.S.C. 6396)

§ 200.87 Responsibilities for participation of children in private schools.

An SEA and its operating agencies must conduct programs and projects under subpart C of this part in a manner consistent with the basic requirements of section 9501 of the ESEA.

(Authority: 20 U.S.C. 6394)

§ 200.88 Exclusion of supplemental State and local funds from supplement, not supplant and comparability determinations.

(a) For purposes of determining compliance with the comparability requirement in section 1120A(c) and the supplement, not supplant requirement in section 1120A(b) of the ESEA, a grantee or subgrantee under part C of Title I may exclude supplemental State and local funds expended in any school attendance area or school for carrying out special programs that meet the intent and purposes of part C of Title I.

(b) Before funds for a State and local program may be excluded for purposes of these requirements, the SEA must make an advance written determination that the program meets the intent and purposes of part C of Title I.

(c) A program meets the intent and purposes of part C of Title I if it meets the following requirements:

(1) The program is specifically designed to meet the unique educational needs of migratory children, as defined in section 1309 of the ESEA.

(2) The program is based on performance targets related to educational achievement that are similar to those used in programs funded under part C of Title I of the ESEA, and is evaluated in a manner consistent with those program targets.

(3) The grantee or subgrantee keeps, and provides access to, records that ensure the correctness and verification of these requirements.

(4) The grantee monitors program performance to ensure that these requirements are met.

(Approved by the Office of Management and Budget under control number 1810–0659)

(Authority 20 U.S.C. 6321(d))

§ 200.89 [Reserved]

48. Revise subpart D of part 200 to read as follows:

Subpart D—Prevention and Intervention Programs for Children and Youth Who are Neglected, Delinquent, or At-Risk of Dropping Out

Sec.
200.90 Program definitions.
200.91 SEA counts of eligible children.
200.92–200.99 [Reserved]

Subpart D—Prevention and Intervention Programs for Children and Youth Who are Neglected, Delinquent, or At-Risk of Dropping Out

§ 200.90 Program definitions.

(a) The following definitions apply to the programs authorized in part D, subparts 1 and 2 of Title I of the ESEA:

Children and youth means the same as ''children'' as that term is defined in § 200.103(a).

(b) The following definitions apply to the programs authorized in part D, subpart 1 of Title I of the ESEA:

Institution for delinquent children and youth means, as determined by the SEA, a public or private residential facility that is operated primarily for the care of children and youth who—

(1) Have been adjudicated to be delinquent or in need of supervision; and

(2) Have had an average length of stay in the institution of at least 30 days.

Institution for neglected children and youth means, as determined by the SEA, a public or private residential facility, other than a foster home, that is operated primarily for the care of children and youth who—

(1) Have been committed to the institution or voluntarily placed in the institution under applicable State law due to abandonment, neglect, or death of their parents or guardians; and

(2) Have had an average length of stay in the institution of at least 30 days.

Regular program of instruction means an educational program (not beyond grade 12) in an institution or a community day program for neglected or delinquent children that consists of classroom instruction in basic school subjects such as reading, mathematics, and vocationally oriented subjects, and that is supported by non-Federal funds. Neither the manufacture of goods within the institution nor activities related to institutional maintenance are considered classroom instruction.

(c) The following definitions apply to the local agency program authorized in part D, subpart 2 of Title I of the ESEA:

Immigrant children and youth and limited English proficiency have the same meanings as the term ''immigrant children'' is defined in section 3301 of the ESEA and the term ''limited English proficient'' is defined in section 9101 of the ESEA, except that the terms ''individual'' and ''children and youth'' used in those definitions mean ''children and youth'' as defined in this section.

Locally operated correctional facility means a facility in which persons are confined as a result of a conviction for a criminal offense, including persons under 21 years of age. The term also includes a local public or private institution and community day program or school not operated by the State that serves delinquent children and youth.

Migrant youth means the same as ''migratory child'' as that term is defined in § 200.81(d).

(Authority: 20 U.S.C. 6432, 6454, 6472, 7801)

§ 200.91 SEA counts of eligible children.

To receive an allocation under part D, subpart 1 of Title I of the ESEA, an SEA must provide the Secretary with a count of children and youth under the age of 21 enrolled in a regular program of instruction operated or supported by State agencies in institutions or community day programs for neglected or delinquent children and youth and adult correctional institutions as specified in paragraphs (a) and (b) of this section.

(a) *Enrollment.* (1) To be counted, a child or youth must be enrolled in a regular program of instruction for at least—

(i) 20 hours per week if in an institution or community day program for neglected or delinquent children; or

(ii) 15 hours per week if in an adult correctional institution.

(2) The State agency must specify the date on which the enrollment of neglected or delinquent children is determined under paragraph (a)(1) of this section, except that the date specified must be—

(i) Consistent for all institutions or community day programs operated by the State agency; and

(ii) Represent a school day in the calendar year preceding the year in which funds become available.

(b) *Adjustment of enrollment.* The SEA must adjust the enrollment for each institution or community day program served by a State agency by—

(1) Multiplying the number determined in paragraph (a) of this section by the number of days per year the regular program of instruction operates; and

(2) Dividing the result of paragraph (b)(1) of this section by 180.

(c) *Date of submission.* The SEA must annually submit the data in paragraph (b) of this section no later than January 31.

(Approved by the Office of Management and Budget under control number 1810–0060)

(Authority: 20 U.S.C. 6432)

§§ 200.92–200.99 [Reserved]

49. Revise subpart E of part 200 to read as follows:

Subpart E—General Provisions

Sec.
200.100 Reservation of funds for school improvement, State administration, and the State academic achievement awards program.
200.101–200.102 [Reserved]
200.103 Definitions.
200.104–200.109 [Reserved]

Subpart E—General Provisions

§ 200.100 Reservation of funds for school improvement, State administration, and the State academic achievement awards program.

A State must reserve funds for school improvement, State administration, and State academic achievement awards as follows:

(a) *School improvement.* (1) To carry out school improvement activities authorized under sections 1116 and 1117 of the ESEA, an SEA must first reserve—

(i) Two percent from the sum of the amounts allocated to the State under section 1002(a) of the ESEA for fiscal years 2002 and 2003; and

(ii) Four percent from the sum of the amounts allocated to the State under section 1002(a) of the ESEA for fiscal year 2004 and succeeding years.

(2) In reserving funds under paragraph (a)(1) of this section, a State may not reduce the sum of the allocations an LEA receives under section 1002(a) of the ESEA below the sum of the allocations the LEA received under section 1002(a) for the preceding fiscal year.

(3) If funds under section 1002(a) are insufficient in a given fiscal year to implement both paragraphs (a)(1) and (2) of this section, a State is not required to reserve the full amount required under paragraph (a)(1) of this section.

(b) *State administration.* (1) An SEA may reserve for State administrative activities authorized in sections 1004 and 1903 of the ESEA no more than the greater of—

(i) One percent from each of the amounts allocated to the State or Outlying Area under section 1002(a), (c), and (d) of the ESEA; or

(ii) $400,000 ($50,000 for the Outlying Areas).

(2)(i) An SEA reserving $400,000 under paragraph (b)(1)(ii) of this section must reserve proportionate amounts from each of the amounts allocated to the State or Outlying Area under section 1002(a), but is not required to reserve proportionate amounts from section 1002(a), (c), and (d) of the ESEA.

(ii) If an SEA reserves funds from the amounts allocated to the State or Outlying Area under section 1002(c) or (d) of the ESEA, the SEA may not reserve from those allocations more than the amount the SEA would have reserved if it had reserved proportionate amounts from section 1002(a), (c), and (d) of the ESEA.

(3) If the sum of the amounts allocated to all the States under section 1002(a), (c), and (d) of the ESEA is greater than $14,000,000,000, an SEA may not reserve more than one percent of the amount the State would receive if $14,000,000,000 had been allocated among the States under section 1002(a), (c), and (d) of the ESEA.

(4) An SEA may use the funds it has reserved under paragraph (b) of this section to perform general administrative activities necessary to carry out, at the State level, any of the programs authorized under Title I, parts A, C, and D of the ESEA.

(c) *State academic achievement awards program.* To operate the State academic achievement awards program authorized under section 1117(b)(1) and (c)(2)(A) of the ESEA, an SEA may reserve up to five percent of the excess amount the State receives under section 1002(a) of the ESEA when compared to the amount the State received under section 1002(a) of the ESEA in the preceding fiscal year.

(d) *Reservations and hold-harmless.* In reserving funds under paragraphs (b) and (c) of this section, an SEA may—

(1) Proportionately reduce each LEA's total allocation received under section 1002(a) of the ESEA while ensuring that no LEA receives in total less than the hold-harmless percentage under § 200.73(a)(4), except that, when the amount remaining is insufficient to pay all LEAs the hold-harmless amount provided in § 200.73, the SEA shall ratably reduce each LEA's hold-harmless allocation to the amount available; or

(2) Proportionately reduce each LEA's total allocation received under section 1002(a) of the ESEA even if an LEA's total allocation falls below its hold-harmless percentage under § 200.74(a)(3).

(Approved by the Office of Management and Budget under control numbers 1810–0620 and 1810–0622)

(Authority: 20 U.S.C. 6303, 6304, 6317(c)(2)(A))

§§ 200.101—200.102 [Reserved]

§ 200.103 Definitions.

The following definitions apply to programs operated under this part:

(a) *Children* means—

(1) Persons up through age 21 who are entitled to a free public education through grade 12; and

(2) Preschool children below the age and grade level at which the agency provides free public education.

(b) *Fiscal year* means the Federal fiscal year—a period beginning on October 1 and ending on the following September 30—or another 12-month period normally used by the SEA for record-keeping.

(Authority: 20 U.S.C. 6315, 6571)

§§ 200.104—200.109 [Reserved]

Appendix—Analysis of Comments and Changes

(**Note**: This appendix will not be codified in the Code of Federal Regulations)

Section 200.11 Participation In NAEP

Comment: One commenter recommended that the language requiring LEAs receiving Title I funds to participate in State-NAEP assessments be strengthened by specifying an expected participation rate for States and LEAs. The commenter further requested additional language that would describe allowable extenuating circumstances that would excuse schools from participating in the State NAEP assessments.

Discussion: Section 1112(b)(1)(F) of the ESEA requires that an LEA, in its plan submitted to the State, provide an assurance that it will participate, if selected, in NAEP. The statute is clear that all LEAs, if selected, must participate. Therefore, the Secretary does not believe that language concerning expected participation rates is needed. The Secretary further believes that there will be few, if any, extenuating circumstances that would excuse a school from participating in the State-NAEP and will address any special circumstances on a case-by-case basis.

Changes: None.

Comment: One commenter, while agreeing that participation of fourth and eighth graders in NAEP testing in mathematics and reading is appropriate, stated that the costs for administering those tests should not be taken from a district's Title I allocation.

Discussion: Section 200.11 states that participation in the State NAEP is mandatory, if the Department pays the costs of administering those assessments.

Changes: None.

Comment: One commenter recommended clarifying that the criteria used for selecting students to participate in NAEP reflect the student population that the State tests for State assessment purposes and for making determinations.

Discussion: Section 411(b)(2)of the National Education Statistics Act of 1994 requires NAEP to ''use a random sampling process which is consistent with relevant, widely accepted professional assessment standards and that produces data that are representative on a national and regional basis.''

Changes: None.

Comment: One commenter recommended adding language to

address the situation for rural schools with no fourth or eighth grade students by stating that ''if the selected school has students in fourth or eighth grade, the school is required to participate in NAEP.''

Discussion: Since it would not be possible for a school to participate in NAEP if it had no students enrolled at the grade(s) tested, no further clarification is necessary.

Changes: None

Comment: One commenter stated that if NAEP results are to be valid and accurate, a district may not be allowed to opt out of tests that rely on sampling techniques. To reinforce this policy the commenter recommended that the Department request Congress to make a technical correction to the ESEA and statutorily modify the contradiction in § 602 of that Act, which amended § 411(d)(1) of the National Education Statistics Act of 1994. Another commenter, however, recommended that § 200.11 allow for voluntary participation in NAEP, consistent with § 1112(b)(1)(f) of the ESEA.

Discussion: The regulation clarifies that, if selected, an LEA that receives funds under part A of Title I of the ESEA must participate in NAEP notwithstanding the provisions of § 411(d)(1) of the National Education Statistics Act of 1994, which generally provides for voluntary participation of LEAs.

Changes: None.

Comment: One commenter recommended clarification of the meaning of ''participate'' because an LEA could agree to participate, but all or most of the selected schools in that LEA could refuse to participate. The current NAEP guidelines require 85 percent participation of selected schools if a State is to report State-level results.

Discussion: Additional clarification is not necessary because an LEA cannot meet the NAEP participation requirement unless it requires all schools selected to participate.

Changes: None.

Section 200.12 Single State Accountability System

Comment: One commenter suggested that States should be directed to develop accountability systems that include multiple assessments that measure higher-order thinking skills. The commenter's rationale was that this would provide more valid and reliable student data.

Discussion: Section 1111(b)(3)(C)(vi) of the ESEA requires that statewide assessments include multiple measures that assess higher-order thinking skills and understanding. This requirement is clarified in § 200.2(b)(7) of the standards and assessment regulations published on July 5, 2002 at 67FR 45038.

Changes: None.

Comment: One commenter suggested that the statutory requirements for determining adequate yearly progress (AYP) be integrated into the State's existing system of accountability. Furthermore, the commenter expressed opposition to using different accountability measures in different States.

Discussion: The Secretary agrees that the statutory and regulatory provisions governing AYP must be integrated into a State's accountability system. To comply with the NCLB Act, each State will need to incorporate these requirements into its current accountability system. The statute gives States flexibility to define achievement standards, design assessments, and implement the accountability provisions. The Secretary believes that these State responsibilities will necessarily result in variation among State accountability systems.

Changes: None.

Comment: One commenter expressed concerns that State accountability systems will exclude homeless children.

Discussion: The statute and the regulations in § 200.6(d) require States to include homeless students in their assessment, reporting, and accountability systems. However, the Secretary is aware that the NCLB Act does not specifically identify homeless students as one of the subgroups whose progress will be monitored in meeting the 2013–2014 proficiency goals. Nevertheless, these students are required to be included in the accountability system. Schools and districts are required to test all students, and high participation rates in statewide assessments (*i.e.*, 95 percent) are a condition of making AYP. Furthermore, these students will be included in at least one subgroup—the ''all student'' category—and schools will be accountable for ensuring this group of students is proficient. To the extent that homeless children are mobile, and many are, the regulations clarify that students who have not been in a school for a full academic year must be included in district accountability, or in State accountability in those cases where students have been in multiple districts.

Changes: None.

Section 200.13 Adequate Yearly Progress in General

Comment: A number of commenters urged the Secretary to include flexibility in the final regulations on to accommodate ''rigorous models that States have already developed that may achieve the same fundamental principles of the statute, although through different approaches,'' as discussed in the preamble to the proposed regulations and the Secretary's July 24, 2002 *Dear Colleague* letter. In particular, commenters sought recognition of the validity of models that use ''growth trajectories,'' performance indices, or other ''value-added'' measures. Other commenters, however, strongly urged the Secretary to ensure that any flexibility regarding the definition in the final regulations does not go beyond the original intention of the ESEA.

Discussion: The NCLB Act included very specific, rigorous requirements that States must implement to determine the AYP of each public school, LEA, and the State itself. In preparing the final regulations, the Secretary has faithfully implemented the statutory provisions governing AYP addressing additional flexibility wherever possible. The Secretary realizes that the accountability systems currently in place in many States may not fully meet the statutory and regulatory requirements. To meet the requirements in the ESEA and these final regulations, a State may continue to use its current State accountability system, consistent with the Secretary's July 24, 2002 *Dear Colleague* letter, if that system integrates AYP as defined in the statute and regulations.

Changes: None.

Comment: One commenter requested clarification regarding the impact of recent changes in the definitions of ethnic groups issued by the Office of Management and Budget (OMB) on the requirement to ensure by major racial and ethnic groups. Another commenter also suggested that any changes in such definitions could hinder State efforts to collect student level achievement data.

Discussion: The Department is developing guidance on the implementation of OMB standards for data on multi-racial/ethnic groups of individuals. Those standards will take effect for educational agencies no sooner than the fall of 2004. Once the Department guidance is issued, the Department plans to provide adequate lead-time for educational agencies to make appropriate adjustments to their data systems. Until that happens, educational agencies are under no obligation to maintain, use, or report data under the OMB standards. Although implementation of the new multi-racial data requirements must await publication of guidance by the Department, the Secretary encourages States to consider taking appropriate steps to implement other provisions of

the OMB standards, such as separating Asians from Native Hawaiians and Other Pacific Islanders.

Changes: None.

Comment: Several commenters strongly recommended that any alternate assessment be based on the same State academic content standards used for the regular assessments. The commenters believed that applying the same standards to all children is the cornerstone of standards-based education. Other commenters, however, supported alternate standards as long as they are developed through a documented and validated process. Additional commenters urged that any student prevented by a disability from completing the regular assessment be permitted to take an alternate assessment based on different standards, not just students with ''the most significant cognitive disabilities.'' One commenter expressed concern that requiring grade-level testing for students with disabilities would be unfair both to individual students and to schools enrolling such students.

Discussion: Too often in the past, schools and LEAs have not expected students with disabilities to meet the same grade-level standards as other students. The NCLB Act sought to correct this problem by requiring each State to develop grade-level academic content and achievement standards that it expects all students—including students with disabilities—to meet, and by holding schools and LEAs responsible for all students meeting those standards. If students with disabilities cannot take a State's regular assessment, even with accommodations, § 200.6(a) of the final Title I regulations published on July 5, 2002 at 67 FR 45038, 45041 required the State to provide for one or more alternate assessments to measure those students' achievement against the State's standards. Those final regulations, however, did not clearly link those alternate assessments to grade-level expectations. To make this link, the Secretary has revised § 200.6(a)(2)(ii) of the final regulations issued on July 5, 2002 to make clear that alternate assessments must yield results for the grade in which a student with disabilities is enrolled. This change is critical to ensure that students with disabilities are not excluded from State accountability systems. This policy may be modified in the future after public comment on the separate notice of proposed rulemaking discussed in the preamble to these final regulations.

Changes: Section 200.6(a)(2)(ii) has been revised to make clear that alternate assessments for students with disabilities who cannot take the State's regular assessment must yield results for the grade in which the student is enrolled.

Comment: Several commenters expressed concern that proposed § 200.13(d) would create a ''loophole'' permitting arbitrary exclusion of some schools from an SEA's regular assessment and accountability system. The commenters noted in particular that widely differing definitions of ''full academic year'' could lead to abuses of the proposed regulations, and that the proposed regulations could be manipulated to avoid assessment of certain students. One commenter recommended clarifying that students attending a school for only part of the academic year, but who are in an assessed grade and who have attended schools in a single LEA for a full academic year, must be assessed and counted in the calculation of AYP for the LEA.

Discussion: The intent behind the proposed regulation was to ensure that schools in which no student attends for a full academic year are held accountable. It was in no way intended to create a ''loophole'' that would permit certain students to not be assessed. In response to these comments, this proposed regulation is removed. Instead, these schools are governed by the final regulation in §§ 200.20(e) and 200.21(b): any student who is not in a school for a full academic year but within a single district for a full academic year is included in accountability for the LEA, and any student who attends schools within several districts but within the same State for a full academic year is included in determinations of State AYP. Schools in which no student has attended for a full academic year would not be subject to determinations of AYP; those students, however, would be assessed and included, as discussed above, in decisions about LEA and State progress.

Changes: Section 200.13(d) has been amended to remove the proposed requirement that a State must establish a way to hold accountable ''schools whose purpose is to serve students for less than a full academic year.''

Comment: Two commenters sought clarification of the types of schools referred to in proposed § 200.13(d)(1)(ii)—that is, those whose purpose was to serve students for less than a full academic year. In particular, one commenter expressed concern that the proposed regulations might require an SEA to hold accountable schools not under its jurisdiction, such as juvenile justice alternative education programs.

Discussion: As discussed above, proposed § 200.13(d)(1)(ii) has been deleted. In accordance with § 200.20(e)(2), to the extent that a school serves students in a juvenile justice alternative education program for less than a full academic year, the school would not be held accountable for those students in determinations of AYP.

With respect to the issue of whether a State must hold accountable schools not under the jurisdiction of the SEA, § 200.13 of the regulations, consistent with the statute, requires each State to develop a single, statewide accountability system that will be effective in ensuring that all LEAs, public elementary and public secondary schools make AYP. The Department generally defers to the State interpretation of what is a public elementary and secondary school and an LEA, in accordance with State law. In a number of States, juvenile justice alternative education programs are conducted in public schools operated within school districts or other entities that are LEAs under State law. In some States, the SEA has oversight responsibility for juvenile justice alternative education programs, or enters into an agreement with the State agency responsible for such programs.

Changes: Section 200.13(d)(1)(ii) has been deleted.

Section 200.15 Timeline

Comment: Several commenters requested clarification of how changes in assessment systems or AYP definitions will impact baselines and AYP calculations over the course of the 12-year timeline for ensuring that all students are proficient.

Discussion: As a State changes its assessments and collects new data, the State may adjust its timeline, annual measurable objectives and intermediate goals, as long as the new system has as its goal that all students achieve proficiency by 2013–14. Further, regardless of changing assessment systems, States must review the progress of schools each year and, based on this annual review, identify schools that do not meet AYP. If a Title I school has not made AYP for two consecutive years, it must be identified for improvement, even if the assessment system changed between those years, thereby changing the basis for identification. Similarly, a school that has been identified for improvement cannot exit school improvement status merely because a different assessment system is used. Examples of ways in which States can continue providing accountability decisions while moving to new

assessments will be included in nonregulatory guidance.

Changes: None.

Section 200.16 Starting Points

Comment: One commenter requested clarification that States are permitted to average assessment data over a period of several years to establish starting points for reading/language arts and mathematics.

Discussion: The Secretary agrees that, consistent with § 200.20(d)(1)(i), more than one year of data can be used to establish the starting point as long as that data includes assessment results from the 2001–02 school year and does not delay the establishment of the starting point. This clarification will be further explained in nonregulatory guidance.

Changes: None.

Comment: Three commenters requested that the final regulations permit States to establish separate starting points for each subgroup of students.

Discussion: The NCLB Act clearly states that the starting point must be the same for each subgroup of students. The final regulations maintain this position. The Secretary believes that this approach establishes similar expectations for all schools and requires high achievement for all students. The final regulations do allow a State to establish separate starting points by grade span.

Changes: None.

Section 200.18 Annual Measurable Objectives

Comment: Two commenters requested that the final regulations permit a State to establish separate baselines and measurable objectives for each subgroup of students.

Discussion: The ESEA clearly states that the starting point and annual measurable objectives must be the same for each subgroup of students.

Changes: None.

Comment: One commenter objected to determining AYP for an LEA based on the academic achievement of all the students enrolled in the LEA, rather than the performance of the schools within the LEA. On the other hand, another commenter recommended that the final regulations clarify that AYP for an LEA be based on the aggregated achievement of its students and not its schools.

Discussion: The ESEA clearly specifies that LEAs are to be held accountable for the achievement of students in the same manner as schools. This means that each LEA is held accountable for all students attending schools within the district for a full academic year. These students must meet or exceed the annual measurable objectives and State goals for the other academic indicators. These provisions are a critical means of ensuring that students who are mobile within a district are not excluded from accountability; they are included in LEA and State accountability.

Changes: None.

Section 200.19 Other Academic Indicators

Comment: Several commenters asserted that, contrary to the ESEA, the proposed regulations appear to make the use of other academic indicators, including graduation rate, optional in the determination of AYP. The commenters recommended that the final regulations clarify that States must include graduation rate at the high school level and one other academic indicator at the elementary and middle school levels as part of their definitions of AYP, and that progress toward intermediate and final objectives for these indicators is required for a State, LEA, or school to make AYP. Another commenter made a similar recommendation, based on the principle that a school that improves test scores by increasing its dropout rate should not make AYP and should be identified for improvement. Another commenter requested that the final regulations reflect the statutory requirement that the other academic indicators adopted by a State be measured separately for each subgroup of students.

Discussion: As stated in § 200.19(a), a State must use graduation rate for high schools and another academic indicator of its choosing for elementary schools and for middle schools to determine AYP. Section 200.19(d)(2) makes clear that the State must disaggregate its other academic indicators, including graduation rate, by each subgroup in order to report that information under section 1111(h) of the ESEA and to calculate whether schools that do not meet the State's annual measurable objectives but have decreased for each subgroup the percentage of students below proficient by at least 10 percent can be considered to have made AYP. As indicated in § 200.19(d)(2)(ii), however, the State need not disaggregate its other academic indicators for determining AYP. The Secretary is confident that publicly reporting disaggregated data on the other academic indicators will ensure that schools, LEAs, and the State are held accountable for subgroup performance.

Changes: Section 200.19(a) and (d)(2) have been modified as discussed above.

Comment: One commenter requested clarification on the definition of ''a regular diploma,'' as used in § 200.19(a)(1)(i). Another commenter asked whether a ''certificate of attendance'' or similar recognition for students with disabilities may be considered a ''regular diploma.''

Discussion: The Secretary believes it is important to clarify this term to ensure that States use graduation rates that are as accurate and meaningful as possible. As a result, the final regulations make clear that a ''regular diploma'' must be fully aligned with the State's academic content standards and may not include a certificate or GED. Thus, if a student with disabilities is given only a certificate of attendance that does not reflect the student's achievement against the State's content standards, that student would not have received a ''regular diploma'' and thus would not be considered to have graduated for purposes of calculating graduation rate.

Changes: The final regulations clarify in § 200.19(a)(1)(i) that a regular diploma may not include an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or GED.

Comment: One commenter objected to the use of the term ''standard number of years'' as part of the regulatory definition of graduation rate, on the grounds that such a limitation could penalize schools serving students—such as students with disabilities, limited English proficient students, and returning dropouts—who typically take longer to graduate.

Discussion: The Secretary believes that the regulations provide sufficient flexibility to address such students. For students that, in very limited instances, may take longer than the standard number of years to graduate, a State may propose a manner for accurately accounting for these students in an alternate definition of graduation rate under § 200.19(a)(1)(i)(B). This definition must be included with the State accountability plan and submitted for peer review.

Changes: None.

Comment: Several commenters expressed concern that proposed § 200.19(a)(1) does not reflect conference report language accompanying the NCLB Act that requires measurement of graduation rates in a way that ''avoids counting dropouts as transfers'' and specifically includes the graduation rate in the definition of AYP. Several commenters also maintained that any alternative to the statutory definition of graduation rate must be based on a ''more accurate

longitudinal system that follows individual student progress'' and thus could accommodate varying numbers of years required to graduate for students with special educational needs. Two of the commenters encouraged the Secretary to take the lead in establishing a ''common framework'' for calculating graduation and dropout rates in all States, and one commenter recommended a specific definition based on a combination of statutory and conference report language. Two other commenters supported the flexibility regarding graduation rates provided in the proposed regulation.

Discussion: The Secretary agrees that the graduation rate should not include students who have dropped out of school as students who have transferred to another school. With the passage of the NCLB Act, the expectations for schools to make AYP have increased; it is critically important that schools do not make AYP simply because students have dropped out of school. The Secretary also agrees that graduation rate should be measured from the beginning of high school in order to capture students who drop out before reaching 12th grade.

Changes: Section 200.19(a)(1)(ii) of the final regulations clarifies that a State must define graduation rate in a manner that does not count students who have dropped out of school as students who have transferred to another school. In addition, § 200.19(a)(1)(i)(A) of the final regulations has been amended to require States to measure graduation rate ''from the beginning of high school.''

Comment: One commenter agreed with proposed § 200.19(c), that gives States discretion to require progress on other academic indicators by setting increasing goals for those indicators, but recommended that the final regulation also not permit a decline in such indicators from the initial baseline level. Another commenter requested clarification as to whether the State must set goals for these indicators or may simply require ''progress'' over a certain ''threshold'' level. A third commenter recommended requiring a timeline for any additional indicators used by a State, including starting points, intermediate goals, and annual measurable objectives for such indicators.

Discussion: The NCLB Act offers flexibility to States to define how progress will be measured relative to the other academic indicators. The regulations permit, but do not require, a State to increase the goals of its other academic indicators over the course of the timeline.

Changes: None.

Section 200.20 Making Adequate Yearly Progress

Comment: In determining AYP, one commenter requested clarification regarding the use of academic indicators in a school that includes both high school students and middle or elementary school students. Since these schools will have two indicators, the commenter asked if the groups must make progress on both for the school to make AYP.

Discussion: The NCLB Act is silent on this issue. The use of these indicators in determining AYP may vary depending on the configuration of a school (*e.g.*, kindergarten through eighth grade, eighth through twelfth grade). The Secretary asks States to propose a policy for addressing this issue when they submit plans for their State accountability systems.

Changes: None.

Comment: One commenter expressed concern that the 95 percent assessment requirement in proposed § 200.20(c)(1)(i) may be misconstrued as relieving States, LEAs, and schools from the requirement to assess all students under §§ 200.2(b)(9) and 200.6.

Discussion: The NCLB Act clearly states that *all* students must be assessed to measure their achievement toward meeting the State's challenging academic standards. Schools and districts are held accountable for ensuring high rates of participation: no less than 95 percent of all students and student subgroups must participate in the statewide assessments.

Changes: Section 200.20(c)(2) clarifies that a State, LEA, or school may not systematically exclude students from taking the statewide assessments.

Comment: Several commenters requested that the final regulations provide flexibility to States in applying the requirement that 95 percent of each subgroup be tested in order to make AYP. Three of these commenters were particularly concerned about the impact on this requirement of State rules permitting parents to exclude their children from statewide assessments. Two other commenters recommended phasing in the 95 percent requirement over several years.

Discussion: The ESEA does not allow for a phase-in of the participation requirement for AYP. The statute does acknowledge through the 95 percent participation rate requirement that there may be instances in which parents do not allow their students to take the statewide assessments. Schools, LEAs, and States need to carefully and thoughtfully explain to parents the importance of participating in such assessments and the consequences for not participating.

Changes: None.

Comment: Two commenters requested clarification that proposed § 200.20(c)(1)(ii), which requires subgroups to be of sufficient size to produce statistically reliable results, applies only to the determination of AYP and does not change the requirement that all students must participate in the annual assessment system.

Discussion: The ESEA clearly states that all students must be assessed to measure their achievement on challenging academic standards. For purposes of determining AYP, if a subgroup within any particular school or district is too small to produce statistically reliable results, the requirement for 95 percent participation would not apply to that subgroup. The Secretary clarifies in the final regulations that a State, LEA, or school may not systematically exclude students from participating in the assessments.

Changes: Section 200.20(c)(2) of the final regulations clarifies that the ''95 percent participation rule'' does not permit a school or LEA to systematically exclude 5 percent of students from participating in the assessments.

Comment: Several commenters recommended that the final regulations clarify that, even if a subgroup is too small to produce statistically reliable data at the school level, the results of that subgroup must be aggregated at the next level—in this case, for the LEA—to ensure that the progress of the subgroup is not simply overlooked or excluded from all calculations of AYP.

Discussion: The Secretary agrees with these comments.

Changes: Sections 200.20(e)(1) and 200.21(b) and 200.7(d) make clear that all students enrolled for a full academic year in an LEA or in a State must be included for accountability purposes at that level, provided the size of a subgroup is large enough to produce statistically reliable results. Subgroups too small to be reported or identified at one level must be included at the next higher level, assuming the subgroup reaches the appropriate size.

Comment: Two commenters expressed concern that varying definitions of ''statistical significance'' applied under proposed § 200.20(c)(1)(ii) could undermine the subgroup-based accountability provisions of the NCLB Act. One commenter recommended that the final regulations include standards to guide States in determining the number of students required to yield statistically reliable information.

Discussion: Determining the number of students required to yield statistically reliable information is the responsibility of each State. The Secretary will review and approve these definitions as part of his approval of State accountability systems. In nonregulatory guidance, the Department may offer some guidelines for States to consider as they make this decision.

Changes: None.

Comment: One commenter recommended that the final regulations provide flexibility in defining AYP for small school districts and single-school LEAs, in particular, that may find it difficult to implement the subgroup-based accountability requirements of the ESEA.

Discussion: The intent of the law is to ensure that all schools and districts are held accountable for student achievement. In those instances in which schools and districts are too small to include any subgroups, the school and district will need to make a decision about AYP at least on the basis of all its students who were enrolled in the school or district for a full academic year. The Department of Education will issue nonregulatory guidance to provide examples of methodologies for handling this issue.

Changes: None.

Comment: Two commenters objected to proposed § 200.20(d)(1)(ii)(B), which would permit a State to delay the determination of AYP on the basis of the new assessments for grades 3–8 required by the NCLB Act until the State has two or three years of data to average under proposed § 200.20(d)(1)(i). One commenter noted that this provision potentially delays the use of the new assessment data until the final year of the current authorization. Another commenter, however, expressed support for the flexibility provided in the proposed regulation.

Discussion: Section 1111(b)(2)(J) of the ESEA permits a State to establish a uniform procedure for averaging data across grades and across years in determining AYP. That provision specifically permits a State averaging data across years to accumulate two or three years of data under the new grades 3–8 assessments required by the NCLB Act before using that data to determine AYP. The final regulations accurately reflect this authority. They also make clear, however, that a State may not delay implementing the new grades 3–8 assessment requirements. Moreover, the State must report these data under section 1111(h)of the ESEA. Further, at a minimum, the State must continue making annual decisions about AYP on the basis of data from the reading/language arts and mathematics assessments in the three grade spans required in Section 1111(b)(3)(C)(v)(I) of the ESEA.

Changes: Section 200.20(d)(1) has been revised to clarify better the intent of these provisions.

Comment: Two commenters recommended modifying proposed § 200.20(e) to restore the statutory emphasis on mitigating the impact of student mobility on assessment results and prevent the potential creation of a loophole permitting the exclusion of dropouts from the determination of AYP. Additionally, another commenter recommended permitting either the State or the LEA to define ''full academic year.''

Discussion: The final regulations are an accurate reflection of the statute: students who are enrolled within a district for a full academic year must be included in the AYP of an LEA. Moreover, the final regulations clarify that students who were not enrolled within a school for a full academic year may not be included within that school's determination of AYP. The Secretary also believes that it is appropriate and justified to leave the decision of what is a ''full academic year'' to each State.

Changes: None.

Section 200.21 Adequate Yearly Progress of a State

Comment: Three commenters recommended that the final regulations specify that students who attend schools within a State but in more than one LEA must be included in the determination of AYP for the State. Two commenters also urged the Secretary to require States to report on the progress of these students.

Discussion: The Secretary concurs with these comments.

Changes: Section 200.21(b) of the final regulations specifies that all students who were enrolled within schools in a State for a full academic year must be included in determining the progress of the State.

Comment: One commenter requested that the final regulations include a description of required technical assistance and other interventions by the Secretary in the case of States that do not make AYP.

Discussion: In the case of a State that does not make AYP, the technical assistance offered by the Secretary would be specific to the State's needs. In order to offer the maximum amount of flexibility in designing technical assistance, this issue will not be addressed in the regulations but will be handled on a case-by-case basis within the statutory parameters.

Changes: None.

Comment: One commenter urged the Secretary to include in the final regulations a description of State obligations and requirements under section 1111 of the ESEA to ensure that each State provides sufficient support to LEAs and schools in implementation.

Discussion: The ambitious goals for student achievement contained within the NCLB Act will best be achieved when States, districts, and schools work together. To that end, the Department will provide nonregulatory guidance about the roles of each entity and how they can support improved achievement. The Secretary understands the important role of the U.S. Department of Education as well and intends to review State accountability plans in an expeditious manner.

Changes: None.

Comment: Two commenters recommended that the final regulations require States to establish English Language Development Standards designed to measure the oral, reading, and written proficiency in English of limited English proficient students, as well as annual exams linked to those standards.

Discussion: These final regulations cover only those provisions contained within Title I of the ESEA. The provisions governing the development of English proficiency are found in Title III. The Department plans to issue nonregulatory guidance on this issue.

Changes: None.

Schoolwide Programs

Section 200.25 Schoolwide Program Purpose and Eligibility

Comment: One commenter cautioned that because the final regulations are used frequently at the district and school level, they should adhere as closely as possible to the NCLB Act. The commenter strongly suggested that the regulations be restored to reflect the omitted statutory requirements for schoolwide programs such as: opportunities for advanced instruction and increased learning time, extended learning opportunities, and provisions related to the needs assessment. The commenter also recommended that the regulations be changed to ensure that schoolwide programs include strategies to meet the educational needs of historically underserved populations.

Discussion: The preamble to the NPRM makes specific reference to the major purpose of schoolwide programs, which is to address the needs and improve academic achievement of all

students in the school, especially for those furthest away from demonstrating proficiency. The language in the preamble did not especially address the comprehensive needs assessment and its provisions because the needs assessment is an integral part of the schoolwide planning process outlined in § 200.26.

Changes: None.

Comment: One commenter requested clarification of the apparently contradictory regulatory language in §§ 200.25 through 200.27, that defines low-achieving children as ''those students furthest away from demonstrating proficiency,'' while the language in § 200.25 states that a schoolwide program need not identify, target, or track these children.

Discussion: In defining lowest achieving children, the preamble refers to those students furthest away from meeting proficient and advanced levels of achievement consistent with sections 1111 and 1116 of the Title I statute. The Secretary agrees that there is a need to clarify in guidance that identification of those students furthest away from meeting proficient and advanced levels of achievement and identification of students for program participation have different implications. Schoolwide programs must be able to accomplish the former. They do not have to perform the latter as a means to achieve it. The Department will clarify this issue further in nonregulatory guidance.

Changes: None.

Comment: One commenter expressed concern about the requirement that all paraprofessional instructional staff in the schoolwide program meet the requirements for paraprofessionals that apply to targeted assistance schools. The commenter expressed concern that many schools will elect to remain in or return to targeted assistance status.

Discussion: Section 1119(c) of the ESEA requires that paraprofessionals hired after January 8, 2002 and working in a program supported with Title I, part A funds be highly qualified. Section 200.58 of the regulations further clarifies that statutory requirement by providing that all paraprofessionals working in a schoolwide program are considered to be supported by Title I, Part A funds. The Secretary believes that individual schools will make the decision to operate a schoolwide program, and continue their operation based on the need to reform the school and improve student achievement.

Changes: None.

Comments: Two commenters objected to the provision in § 200.25(b)(1)(ii) that the 40 percent poverty eligibility threshold for operating a schoolwide program is required for only the initial year of the program. The commenters suggested that this provision be deleted, so that if a school's poverty level decreases in subsequent years it can no longer operate as a schoolwide project.

Discussion: Section 1114(a)(1) of the ESEA establishes the 40 percent eligibility threshold for a school to operate a schoolwide program. The intent of the statute is to enable the schoolwide program to improve the entire educational program of the school. Long-term reform occurs over time and requires sustained and consistent intervention if student achievement is to improve. The Secretary believes that making the 40 percent threshold an initial eligibility requirement, rather than an annual eligibility requirement, reinforces this long-range approach.

Changes: None.

Comments: Two commenters questioned, in § 200.25(b)(2), the advisability of allowing schools to choose a measure of poverty to determine eligibility for schoolwide programs that is different from the measure used by LEAs for Title I allocation purposes. One recommended requiring identical measures of poverty across the LEA's Title I program, or at least requiring equivalent or comparable measures of poverty.

Discussion: The provision to allow a school to use a poverty measure that is different from the one the LEA selects for Title I allocation purposes when determining eligibility for operating a schoolwide program is a continuation of flexibility provided under the old regulations. An LEA may use more restrictive free school lunch data, rather than free and reduced-price lunch data to determine which schools are eligible for Title I and to allocate funds. Based on free lunch data, however, a school might not meet the 40 percent schoolwide eligibility criteria data, while it might qualify if free and reduced-price lunch data were used. The Secretary wants to continue providing as much flexibility as possible to enable schools to qualify for implementing a schoolwide program.

Changes: None.

Section 200.26 Development and Evaluation of Schoolwide Program Plan

Comment: One commenter remarked that the language of the proposed regulation concerning the development of the schoolwide plan is complex and confusing because of its organizational structure and recommended reorganizing § 200.26 along the lines of the NCLB Act.

Discussion: The language in § 200.26 of the NPRM was intended to clarify that a schoolwide plan must describe how the school will improve academic achievement and make explicit the process used for developing the plan. However, the Secretary believes that the organization in the NPRM may be confusing and concurs that reorganizing the regulations to make them more consistent with the NCLB Act would make clearer the planning process required to operate a schoolwide program.

Changes: The Secretary has reorganized the regulations by adding a new § 200.26 (renamed ''Core elements of a schoolwide program'') and placed it under the undesignated center heading ''Schoolwide Programs'' in subpart A of part 200 to make the regulations consistent with the statute. All cross-references have been amended appropriately.

Comment: One commenter recommended an addition to § 200.26(b)(1) to acknowledge that the needs of migratory children are constantly changing, requiring an ongoing needs assessment process.

Discussion: The comprehensive needs assessment described in § 200.26 addresses the needs of the school, in general, and specifically requires that the needs of migratory children be taken into account when conducting the needs assessment. The Secretary has added language to this section that includes migratory children as part of the needs assessment and provides a specific reference to the definition contained in section 1309(2) of the ESEA.

Changes: The Secretary has added a new § 200.26 and placed it under the undesignated center heading ''Schoolwide Programs.'' The language in this new section provides for the use of academic achievement information for all students in the school including all demographic groups of students as part of the needs assessment. The inclusion of migratory students in the needs assessment, and as defined in section 1309(2) of the NCLB Act is referenced in this section.

Comments: Several commenters referenced language in § 200.26(a)(2)(ii) requiring a focus on scientifically based research. One remarked that the meaning of this term is widely debated and that the application of science to improved instruction is often a complex process. One commenter asked for clarification about the meaning of regulatory language that requires a school's process for developing its schoolwide plan to focus on scientifically based research.

Discussion: Scientifically based research is defined in section 9101(B)(37) of the ESEA as ''research that involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs.'' The strategies and methods used in schoolwide programs must be of high quality and have a reasonably high probability of increasing student achievement.

Changes: None.

Comments: Several commenters requested amplification of language regarding the schoolwide planning process to reinforce the notion that the process must be meaningful, to provide clarity regarding who should participate in the evaluation of the program's effectiveness, and to require that the comprehensive needs assessment include data on school funding and the school's capacity to meet needs. One commenter in this group also requested that the regulations be more explicit about the importance of the comprehensive needs assessment to the planning process.

Discussion: The Secretary agrees that the schoolwide planning process must be meaningful, and reflect data obtained from the comprehensive needs assessment. The resulting plan must include strategies for improved student achievement, evaluation, monitoring for effectiveness, and for amendment of the plan, as needed.

Changes: To make this policy clear and to address the comenters' concerns, the Secretary has reorganized § 200.26 and renamed it ''Core elements of a schoolwide program''. In the NPRM, these provisions were contained under § 200.28—Use of funds in a schoolwide program. The new § 200.26 outlines the basic elements of the schoolwide program planning process with regard to conducting a comprehensive needs assessment, developing a comprehensive plan, and evaluating the program.

Comment: One commenter noted widespread confusion about the Title I provisions related to serving homeless children and recommended further elaboration in nonregulatory guidance on needs and issues affecting homeless students. The commenter also suggested that the school needs assessment take into account the needs of homeless as well as migrant students.

Discussion: The Secretary agrees with the commenter's concerns and will address in nonregulatory guidance the issue of including the homeless population in all schoolwide reform efforts. The language included in revised § 200.26(a)(1)(i) provides that the comprehensive needs assessment must be based on academic achievement information about all students in the school, which includes homeless and migrant students.

Changes: None.

Comments: One commenter expressed concern that the needs assessment was taken out of the listing of components, thereby eliminating the requirement for a school to describe the needs assessment in its schoolwide plan.

Discussion: The needs assessment is critical to the development of the comprehensive schoolwide program plan. A review of the core elements of the schoolwide program includes the comprehensive needs assessment, the comprehensive plan, and the evaluation. The description of the comprehensive needs assessment may be included as a part of this section.

Changes: In the revised § 200.26, the Secretary has included three subparts that address the comprehensive needs assessment, the comprehensive plan, and the evaluation.

Comments: Two commenters expressed concern about the importance of including strategies to increase parental involvement, and requested that the regulations make reference to the parental involvement requirements contained in section 1118 of the ESEA.

Discussion: The Secretary concurs that including parents in all aspects of schoolwide program planning, development, and implementation is essential.

Change: The Secretary has included provisions for parental involvement, consistent with the ESEA, in §§ 200.27(b)(2); 200.27(c)(1) and (2); and 200.28 (c)(3)(i).

Section 200.27 Schoolwide Program Implementation Components

Comments: Several commenters expressed concern that this section of the proposed regulations omitted several key components that are critical to operating a schoolwide program: These components include the participation of teachers in the decisions regarding use of assessments, increasing the amount and quality of learning time, strategies to meet the needs of historically underserved populations, methods that help provide an accelerated and enriched curriculum, language that refers to proficient and advanced levels of academic achievement, inclusion of information about how the school will determine if academic needs have been met, and instruction by highly qualified teachers.

Discussion: The proposed regulations organized the schoolwide requirements to emphasize key components necessary for the operation of a successful schoolwide program. The intent of the NPRM was to outline an approach that would lead schools to restructure in ways that would be most likely result in improved student achievement. However, the Secretary agrees that the proposed regulations may be confusing because those provisions did not parallel the language in the ESEA.

Changes: The Secretary has amended and renamed § 200.27—Schoolwide program components—to make the regulations parallel the statute more closely and to address the specific concerns of the commenters.

Comments: Two commenters expressed concerns about proposed language in § 200.27(c) of the NPRM, which requires the inclusion of parents in the planning and academic intervention process, and requires that student achievement reports be provided to parents in a language that they can understand.

Discussion: The Secretary strongly supports the right of parents to be involved in the schoolwide planning process and to have information regarding the education services provided to their children in a form and language they can understand.

Changes: The Secretary has clarified the parental involvement provisions in §§ 200.27(b)(2) and 200.27(c) to require that a school develop its schoolwide comprehensive plan with the involvement of parents, consistent with section 1118 of the ESEA and to make that plan available to parents in an understandable format and, to the extent practicable, in a language that parents can understand.

Comment: One commenter believed that the reference in § 200.27(a) concerning the application of the new science requirement by 2005–06 was inappropriate because improvement in meeting standards cannot be demonstrated without a proper assessment.

Discussion: the Secretary agrees that the reference to science in § 200.27(a) is confusing and that providing a general reference to improving the opportunities of students to meet the State's proficient and advanced levels of student achievement is more appropriate.

Changes: The Secretary has made this clarifying change in § 200.28(a)(1).

Section 200.28 Use of Funds in a Schoolwide Program

Comment: One commenter asked that § 200.28 be further clarified to confirm that consolidation of funds does not constitute a waiver of the school's obligation to comply with the requirements of the NCLB Act, nor does

it diminish the school's obligation to fulfill other programs' purposes. All program purposes and needs must be met, not merely addressed.

Discussion: The Secretary agrees with the commenter's concern and will provide further clarification in nonregulatory guidance.

Changes: None.

Comments: Several commenters recommended that § 200.28(c)(3)(i)(A) and (B) require that before consolidating Title I part C funds, a school first meet the unique educational needs of migratory students that result from their migratory lifestyle and document that these needs have been met. Several of these commenters further recommended that documentation could consist of maintaining a record of the actions taken by the school or LEA on behalf of migrant students.

Discussion: The Secretary agrees with these concerns and will provide further clarification in nonregulatory guidance.

Changes: None.

Comment: Several commenters recommended an addition to § 200.28(c)(3)(i) of the NPRM to include consultation with parents of migrant children or organizations representing those parents, or both.

Discussion: The Secretary concurs with commenters regarding the importance of involving parents of migratory children and the organizations that represent them.

Changes: The Secretary has clarified in § 200.28(c)(1)(i) that an LEA must consult with parents of migratory children or organizations representing those parents, or both.

Comment: One commenter noted that currently the latest list of programs identified by the Department that may be combined in a schoolwide program was published in a September 21, 1995 **Federal Register** notice. This does not allow for combining of funds from new programs created by the NCLB Act. The commenter recommended that the regulations specify which Federal funds administered by the Secretary may be combined in a schoolwide program.

Discussion: The Secretary understands the importance of LEAs and schools knowing which funds may be combined in a schoolwide program and will publish an updated list in the **Federal Register** soon after publication of the final regulations.

Changes: None.

Comment: One commenter noted that the provision in § 200.28(c)(3)(iii) allowing for consolidation of IDEA funds in a schoolwide program is not in the ESEA, and recommended that this provision should be deleted from the regulations.

Discussion: The provisions in the regulations concerning consolidation of special education funds are consistent with the requirements of section 613(a)(2)(D) of the IDEA. The regulations provide that the amount of funds consolidated for special education purposes may not exceed the amount received by the LEA under part B of IDEA for that fiscal year, divided by the number of children with disabilities in the jurisdiction of the LEA, and multiplied by the number of children with disabilities participating in the schoolwide program.

Changes: None.

Comment: One commenter noted that § 200.28(c)(4)(i)(A), of the proposed regulations, that provides that programs consolidated in a schoolwide program are exempt from statutory or regulatory provisions governing their operation, does not include an important qualification contained in section 1114 (a)(3)(A) of the ESEA. This statutory provision allows programs to be consolidated only ''if the intent and purpose of such other programs are met.'' This omission must be restored in order to conform to the ESEA.

Discussion: The Secretary agrees with the commenter.

Changes: The Secretary has added clarifying language in § 200.29(b)(1)(ii) requiring that a school consolidating and using in a schoolwide program funds from any other Federal program administered by the Department meet the intent and purposes of that program and ensure that the needs of the intended beneficiaries of that program are addressed.

Comment: One commenter urged that the regulations be changed to ensure that a school operating a schoolwide program does not use Title II, part D, Education Technology Grant funds for purposes other than those authorized by the statute. The commenter suggested that language be added to § 200.28(c)(4)(i)(C) to require that a schoolwide program as a whole, addresses the ''intent, purposes, activities and uses'' of funds, rather than just the ''intent and purposes'' of funds, for each Federal program whose funds were consolidated to support the schoolwide program.

Discussion: The Secretary believes that the language now in § 200.29(d) requiring that the intent and purposes of the programs consolidated in a schoolwide program be met provides sufficient protection to ensure that the needs of the children specifically designed to be served by those programs are met. The proposed change would take away the flexibility a school would have in operating schoolwide programs. The purpose of a schoolwide program is to enable a school to combine its Federal, State and local resources so it can focus on providing comprehensive services that best enable its students to meet State's academic content and student achievement standards. In exchange for this flexibility, the school must ensure that its students make progress toward meeting those academic content and student achievement standards.

Changes: None.

Comment: One commenter recommended adding a new paragraph (d) to § 200.28 mandating that States require LEAs to involve providers of federally funded adult education and career technical education programs to ensure the maximum support for the academic achievement of students in local schools.

Discussion: While the Secretary agrees that providers of Federally funded adult education and career technical education programs can play an important role in providing services to students in local schools, involving these providers in not a specific statutory requirement and may not be appropriate in every schoolwide program.

Changes: None.

LEA and School Improvement

Section 200.30 Local Review

Comment: One commenter objected to giving LEAs the responsibility for conducting the annual progress review to determine whether participating schools are making AYP, on the grounds that a statewide system would better ensure equity and reliability in making AYP determinations.

Discussion: The Secretary understands the concerns of the commenter, but believes that the combination of the statewide assessment system described in § 200.2 and the AYP requirements described in §§ 200.13 through 200.20, which LEAs must use in conducting their review of school performance, will ensure that such reviews are conducted in a fair and uniform manner across each State. While the statute clearly specifies that the local review and school improvement process is an LEA responsibility, it also ensures that, in carrying out this responsibility, LEAs will rely primarily on standards and indicators developed at the State level.

Changes: None.

Comment: One commenter expressed concern that the proposed regulations do not address the role of charter school LEAs or other single-school LEAs in the school review and improvement process.

Discussion: Single-school LEAs have the same role and responsibilities in the school review and improvement process as other LEAs, including responsibility for review of school progress in meeting adequately yearly progress requirements, identifying the school for improvement, corrective action, or restructuring, providing public school choice options under § 200.44, and making available supplemental educational services in accordance with §§ 200.45 and 200.46.

Changes: None.

Comment: One commenter expressed concern that the proposed regulations imply that LEAs are not required to use other academic indicators in determining whether a school has made AYP.

Discussion: As clarified in § 200.19(a), a State must use graduation rate for high schools and another academic indicator of its choosing for elementary schools and for middle schools to determine AYP. At the local level, an LEA may use additional academic assessments or indicators for the purpose of identifying additional schools for improvement, corrective action or restructuring. In addition, progress on these LEA academic indicators may permit a school to make AYP in accordance with the exception clause specified in § 200.20(b).

Changes: None.

Comment: One commenter objected to the proposed regulation permitting an LEA to limit its review of a school operating a targeted assistance program to the academic achievement of only those children served by the program. The commenter noted that this regulation could create a disincentive for schools to operate schoolwide programs and could hinder the development of single, statewide accountability systems covering all students.

Discussion: The Secretary agrees with the concerns expressed by the commenter, but notes that the regulations reflect the clear language of the statute. In addition, the Secretary believes that few schools will take advantage of this provision, because it would, by definition, limit review to the lowest-achieving students and thus might make it more difficult for a school to demonstrate AYP.

Changes: None.

Comment: One commenter recommended adding to the final regulations statutory language regarding the use of the results of the LEA's annual review of school performance.

Discussion: The Secretary believes that in the overall context of AYP and school improvement requirements, the purposes of the annual progress review and the use of the results of that review are sufficiently explained in the regulations. Any further explanation may be accomplished through nonregulatory guidance.

Changes: None.

Section 200.32 Identification for School Improvement

Comment: Several commenters maintained that the identification timeline in the proposed regulations does not allow sufficient time for States to make available assessment data from a given school year, or for school districts to analyze that data and identify schools for improvement, corrective action, or restructuring, prior to the beginning of the next school year.

Discussion: The identification timeline in the proposed regulations is faithful to the timeline specified in the ESEA. The Secretary recognizes that States may have to adjust their assessment schedules to comply with this timeline, but the centrality of the timeline to the integrity of the entire improvement process, as well as the plain language of the statute, permit no alternative.

Changes: None.

Comment: One commenter recommended that the timeline for identifying schools for improvement be based on the school year in which assessment results become available, rather than the school year in which the assessments are administered.

Discussion: Section 1116(b)(1)(B) of the ESEA requires identification ''before the beginning of the school year following such failure to make.'' The Secretary believes that this phrase unambiguously links identification to the school year in which the failure occurred, and not to the availability of assessment results documenting that failure. In addition, section 1116(a)(2) of the ESEA, incorporated into the regulations as § 200.49(e), reinforces this approach by requiring SEAs to make assessment results in a given school year available to LEAs before the beginning of the next school year. Any delay in this identification timeline would severely undermine the strong accountability, with consequences for schools and options for students, that is at the core of the NCLB Act.

Changes: None.

Comment: Two commenters expressed concern that the proposed regulations appear to hold LEAs responsible for identifying schools for improvement prior to the beginning of the school year even if SEAs fail to make assessment results available on a timely basis.

Discussion: Section 200.49(e) of the final regulations specifically requires SEAs to ensure that the results of academic assessments administered as part of the State assessment system for a given year are available to LEAs before the beginning of the next school year. In addition, § 200.49(e)(1) clarifies that the SEA must provide the required assessment data in sufficient time to permit the LEA to make the identification in accordance with § 200.32(a)(2). Finally, § 200.49(e)(2) prohibits an LEA from identifying a school for improvement, corrective action, or restructuring unless the SEA has provided assessment results to the school.

Changes: The final regulations include additional language in § 200.49(e)(1) requiring SEAs to make available assessment data for a given school year to LEAs ''in such time as to allow for the identification'' for improvement prior to the beginning of the next school year.

Comment: Several commenters objected to the flexibility provided in proposed § 200.32(d) and (e) regarding the identification of schools for improvement or removal of schools from improvement status on the basis of 2001–2002 assessment results. The commenters interpret the statute as requiring the identification for improvement of any school that fails to make AYP for two consecutive years, as well as the removal from improvement status of any school that makes AYP for two consecutive years, regardless of the years involved.

Discussion: The Secretary believes that the absence of any reference to 2001–2002 assessment results in the otherwise very specific transition provisions of the statute, combined with the strong likelihood that many States would not be able to make these results available to LEAs prior to the beginning of the 2002–2003 school year, supports a flexible approach to the use of those results for identification purposes during the transition to the NCLB Act.

Changes: None.

Comment: Two commenters expressed concern that the proposed regulations, which give LEAs flexibility in the use of 2001–2002 assessment data in making identification decisions not specifically covered under the transition provisions of the statute, could create confusion regarding the use of 2001–2002 assessment data in subsequent years.

Discussion: The Secretary agrees that the flexibility provided in the proposed regulations could be interpreted as permitting LEAs to ignore 2001–2002 assessment data in making

identification decisions in subsequent years. The regulations clarify that an LEA decision not to identify for improvement a school that, on the basis of 2001–2002 assessment data, does not make AYP for a second consecutive year, does not permit the LEA to ignore that failure in making future identification decisions.

Changes: Section 200.32(e) has been amended to clarify that if an LEA chooses not to identify for improvement a school that, on the basis of 2001–2002 assessment results, does not make AYP for a second consecutive year, it nevertheless must consider the school's 2001–2002 performance as the first year of not making AYP for the purpose of subsequent identification decisions.

Comment: One commenter asserted that the proposed regulations unfairly penalize schools that were hoping to exit improvement status by making AYP in two out of three years, as provided for under the previous statute. For example, under the old law, a school that made AYP in the 1999–2000 school year, failed to make AYP in 2000–2001, and made AYP in 2001–2002 would be removed from improvement status. Under the new law, however, such a school would continue to be identified for improvement until it makes AYP for two consecutive years.

Discussion: The reauthorized ESEA specifies the identification status of schools identified for improvement under the previous law, but makes no exceptions to the new requirement that schools may be removed from improvement only after making AYP for two consecutive years. The Secretary has provided limited flexibility to LEAs to identify for improvement or remove from improvement schools in certain situations not covered by the statutory transition provisions. In both instances, however, this flexibility is consistent with the ''two consecutive year'' standard of the statute. The Secretary's authority to provide flexibility in implementing the new law does not extend to overriding this standard.

Changes: None.

Comment: Several commenters objected to the proposed requirement that LEAs make choice immediately available to students attending schools that are identified for improvement after the beginning of the school year following the year in which the LEA administered the assessments that resulted in the identification for improvement. The commenters believe that this requirement will be unnecessary if identification takes place in accordance with the statutory timeline (prior to the beginning of the school year), and that if identification occurs following the beginning of the school year, the statute requires LEAs to provide choice no sooner than the first day of the school year following identification.

Discussion: The commenters are correct in their observation that the mid-year choice requirement of proposed § 200.32(f)(1) is unnecessary if identification occurs in accordance with the statutory timeline. The Secretary's intention, however, was to encourage adherence to that statutory timeline by removing a potential incentive for delaying identification until after the beginning of the school year. In other words, an LEA may not postpone its obligation to provide public school options to students attending schools identified for improvement simply by delaying identification.

Changes: None.

Comment: Several commenters objected to the proposed regulations requiring an LEA to count as a full year of improvement any year in which the LEA identifies a school for improvement after the beginning of the school year. The commenters maintained that mid-year identification would not provide adequate time for districts and schools to develop and implement effective improvement plans. They also noted that the statutory timeline is linked to identification and generally requires a ''full school year'' at each stage of the improvement process. One commenter suggested that while a school identified in mid-year should start the improvement process, it should not officially enter improvement status until the beginning of the next school year.

Discussion: The Secretary understands the concerns of the commenters, particularly with regard to giving schools adequate time to prepare and carry out effective improvement plans. However, the clear intention of the NCLB Act is to impose rigorous accountability measures on a precise timeline designed both to bring about rapid improvement in school quality and to provide immediate options to students attending identified schools. Giving primacy to the ''full school year'' language of the statute potentially rewards LEAs that violate the statutory identification timeline, delays the availability of public school choice and supplemental educational services to students, and unacceptably extends an already lengthy improvement timeline (which permits six years of not making before implementation of restructuring). The regulations underscore, in § 200.49(e), the importance of SEAs ensuring that LEAs and schools receive their assessment data in a timely manner so that they can meet the statutory school improvement deadlines.

Changes: None.

Section 200.33 Identification for Corrective Action

Comment: Two commenters objected to the flexibility provided to LEAs in proposed § 200.33(c) to remove from corrective action a school that, on the basis of assessments administered during the 2001–2002 school year, makes AYP for a second consecutive year. They maintained that the statute requires LEAs to remove schools from corrective action in such cases, and one commenter argued that LEAs also should use 2001–2002 assessment data to identify additional schools for corrective action.

Discussion: The Secretary believes that the proposed regulations are an appropriate way to address an inequity in the statutory transition provisions covering identification for corrective action. These provisions require LEAs to treat schools that were identified for corrective action prior to enactment of the NCLB Act as subject to corrective action for the 2002–2003 school year. Some of these schools, however, may have made AYP in both 2000–2001 and 2001–2002, thus meeting the statutory requirement for removal from corrective action. The proposed regulations permit LEAs to remove these schools from corrective action, but does not require such removal because some LEAs may, in part due to the uncertain timing of assessment results, prefer simply to adhere to the statutory transition provisions.

On the issue of identifying additional schools for corrective action, § 200.32(c)(1) already specifies the identification status of schools that have been identified for improvement for two or more consecutive years. LEAs must treat such schools as being in the second year of improvement under the new law for the 2002–2003 school year. Failure to make AYP in 2001–2002 would not change this designation. The proposed regulations thus reflect the clear intent of the NCLB Act to identify for corrective action, for the 2002–2003 school year, only those schools identified for corrective action under the previous law.

Changes: None.

Section 200.36 Communication with Parents

Comment: One commenter expressed concern about the rights of parents with limited English proficiency, in light of Title VI of the Civil Rights Act and Executive Order 13166, to receive communications about their child in a

language that they understand. In addition, two commenters urged the Secretary to require the use of native language to communicate with parents in areas where large numbers of students share the same primary language.

Discussion: Section 1116 of the ESEA requires SEAs and LEAs to keep parents informed during the school improvement process and, to the extent practicable, to provide information to parents with limited English proficiency in a language the parent understands. In addition, Title VI of the Civil Rights Act of 1964 and longstanding Department policy require SEAs and LEAs to communicate information to limited-English proficient parents that is communicated to non-limited English proficient parents. Under Title VI, SEAs and LEAs have flexibility in determining what mix of oral and written translation services may be necessary and reasonable for communicating this information. This policy is also consistent with Executive Order 13166.

It is the Department's position that, pursuant to the requirements of section 1116 of the ESEA, it is ''practicable'' to provide information to limited-English proficient parents orally in a language that they understand. This interpretation of Section 1116 of the ESEA also is consistent with Title VI, longstanding Department policy under Title VI, and Executive Order 13166.

Additionally, section 1116 of the ESEA requires written translations of printed information to be provided to parents with limited English proficiency in a language they understand, whenever such written translations are ''practicable.'' If it is not ''practicable'' to provide written translations of notices, section 1116 requires SEAs and LEAs to ensure that parents with limited English proficiency are provided oral translations of the written information. This requirement to translate orally written information whenever a written translation is not practicable is consistent with Title VI, longstanding Department policy under Title VI, and Executive Order 13166.

Changes: None.

Comment: One commenter suggested additional regulatory language to ensure effective communication with the parents of limited English proficient and migrant students. In particular, the commenter recommended the use of non-traditional communication vehicles, such as posting notices at churches and distributing information through social service providers.

Discussion: The Secretary agrees that effective communication with the parents of limited-English proficient and migrant students is important, but he believes that widely varying local circumstances argue in favor of addressing the concerns raised by the commenter in nonregulatory guidance rather than through ''one-size-fits-all'' regulatory prescription.

Changes: None.

Comment: One commenter expressed concern that it would not be possible for a State to communicate directly with parents, as required by the proposed regulations, if the State does not maintain information, such as street or e-mail addresses, on individual students. The commenter recommended requiring States to communicate to parents only through such broader means as the Internet and other media. Another commenter addressed a similar concern by recommending that States be permitted to fulfill their obligation by providing school improvement information to LEAs and schools, which would then distribute the information to parents, rather than requiring States to communicate directly with parents.

Discussion: The Secretary agrees that the proposed regulations should be amended to reflect the limited student information available to States in some cases. However, the final regulations continue to require States to communicate to individual students and their families, even if they must do so indirectly through LEAs and schools.

Changes: Section 200.36(b)(1) has been amended to permit States to distribute information to parents through LEAs and schools.

Comment: One commenter recommended that any information provided to parents also be provided to teachers and other school staff so that educators know and understand what is happening in their schools.

Discussion: Section 200.36 is intended to clarify statutory requirements regarding communication with parents during the school improvement process. Notice requirements affecting teachers and school staff are addressed elsewhere, such as in §§ 200.30 and 200.43.

Changes: None.

Comment: One commenter requested clarification of proposed § 200.36(c), which requires all communications to respect the privacy of students and their families.

Discussion: The proposed regulations are intended to help prevent, for example, the public disclosure of the names of students receiving supplemental educational services, as prohibited by § 200.46(a)(5) and (b)(2)(v). Further clarification will be provided in nonregulatory guidance.

Changes: None.

Section 200.37 Notice of Identification for Improvement, Corrective Action, or Restructuring

Comment: Two commenters recommended adding a definition of ''promptly'' in proposed § 200.37(a), which requires LEAs to ''promptly notify'' parents when their child's school has been identified for improvement. The commenters expressed particular concern that parents have sufficient time to consider public school choice options.

Discussion: The Secretary agrees that timely notification is essential to ensuring that parents are able to make informed choices regarding their children's education. Such notifications should be made as soon as possible. However, the precise amount of time required may vary depending on local circumstances. The Department has issued nonregulatory guidance on this issue.

Changes: None.

Comment: One commenter recommended including, in the notice to parents that their child's school has been identified for improvement, a description of the actions being taken to improve the school.

Discussion: The Secretary agrees that information on the action being taken to improve a school is important, and notes that § 200.38(a) requires an LEA to provide such information to parents. However, because parental consideration of choice and supplemental educational service options generally must occur at the same time a school is developing its school improvement plan, it will usually be impossible to include such information in the initial notice of identification.

Changes: None.

Comment: One commenter recommended that the explanation of the option to transfer described in § 200.37(b)(4)(i) include a reference to the provision of transportation to the new school.

Discussion: The proposed regulations referenced proposed § 200.44, which included choice-related transportation requirements, but the Secretary agrees that the restoration of the statutory reference to transportation in the notice requirement will clarify this issue.

Changes: Section 200.37(b)(4)(i) has been amended to include a discussion of transportation in the explanation of the option to transfer provided to parents as part of the notice of identification for improvement, corrective action, or restructuring.

Comment: Two commenters objected to the proposed requirement in § 200.37(b)(4)(ii) that LEAs provide information to parents on the performance of the school or schools to which their children may transfer. Both commenters found this requirement administratively burdensome, particularly in districts that offer a large number of choices and thus would have to document the performance of many schools. One commenter suggested that LEAs be permitted to ''direct'' parents to publicly available sources of such information, such as a school or district Web site.

Discussion: Since a basic principle of the public school choice option required as part of the school improvement process is to give parents in low-performing schools the opportunity to send their children to a higher-performing school, the Secretary believes the provision of the information called for in proposed § 200.37(b)(4)(ii) is essential. However, the regulations provide substantial flexibility to LEAs in selecting the most meaningful local measures of academic achievement, rather than mandating either the kind or number of such measures. LEAs are free, and indeed encouraged, to summarize school performance in a manageable and understandable format, rather than overwhelm parents with detailed reports. In addition, the final regulations clarify that, for the purposes of § 200.44, the only required indicator of performance is the academic achievement of students in the receiving schools. Finally, while it may be appropriate to direct parents to sources such as Web sites for additional information, basic performance information should be provided directly to parents, many of whom lack access to electronic information sources such as the Internet.

Changes: Section 200.37(b)(4)(ii) has been amended so that the only performance information required in the explanation of the public school choice option is the academic achievement of the schools to which a student may transfer.

Comment: One commenter suggested that the Secretary require, rather than encourage, LEAs to provide the additional information on public school choice options described in § 200.37(b)(4)(iii).

Discussion: The ESEA requires only that LEAs offer parents and students the option to transfer to another public school that is not identified for improvement, corrective action, or restructuring. This emphasis on academic performance is reflected in the information required by § 200.37(b)(4)(ii). The Secretary agrees that additional information on the options available to parents is desirable, but believes that LEAs should have flexibility to provide the most useful information in light of local needs and circumstances.

Changes: None.

Comment: One commenter recommended that the information on the school or schools to which a student may transfer include a description of parental involvement programs.

Discussion: The Secretary agrees that, in addition to the academic quality of the school, the opportunity for greater involvement in their child's education could be an important consideration for parents exploring public school choice options. However, we do not agree that such information should be required.

Changes: In order to clarify that information on parent opportunities may be provided in the explanation of the parents' option to transfer their child to another school, § 200.37(b)(4)(iii)(D) has been amended to specifically authorize provision of a description of parental involvement opportunities at the school or schools to which the student may transfer.

Comment: Two commenters objected to the proposed requirement that the annual notice of the availability of supplemental educational services include approved providers of technology-based or distance-learning services. One commenter maintained that the proposed regulations are unnecessary and implied a preference for technology-based providers over other providers, while another asserted that any clarification of means of providing services is more properly the role of SEAs, since they are responsible for approving providers.

Discussion: The success of the supplemental educational services component of the school improvement process depends on the availability of a sufficient number of providers to meet the diverse educational needs of students. Provider availability is a particular concern in poor urban and rural areas where it is reasonable to expect there will be the greatest demand for supplemental educational services. Technology provides a means to overcome geographic and demographic barriers to the provision of high-quality services. For this reason, the Secretary believes it is appropriate to emphasize the potential role of technology-based providers. Finally, the ESEA clearly assigns responsibility for providing annual notice to parents of the availability of supplemental educational services to the LEA, not the SEA.

Changes: None.

Comment: One commenter recommended including in the information about supplemental educational service providers the religious affiliation of such providers, the duration of services, whether services are school-based, and whether transportation to the provider is available.

Discussion: The Secretary believes that § 200.37(b)(5)(ii)(B) is sufficient to ensure the provision of such information in the annual notice of the availability of supplemental educational services, and will clarify this requirement in nonregulatory guidance.

Changes: None.

Comment: One commenter recommended requiring LEAs to include, in the explanation of public school choice and supplemental educational service options, a detailed discussion of procedures required to exercise such options, including any required forms, documentation, and schedules or deadlines.

Discussion: Procedures for exercising a public school choice or supplemental educational service option may vary widely from district to district depending on such factors as pre-existing choice programs, the timing of identification, and the use of technology. For this reason, the Secretary believes that the best way to address the commenter's concerns is through general guidelines in nonregulatory guidance.

Changes: None.

Section 200.38 Information About Action Taken

Comment: One commenter suggested that the final regulations require an LEA to include, in its explanation of corrective action or restructuring, a description of actions recommended by school-level staff or a school-level governance committee.

Discussion: The ESEA requires only that LEAs publish and disseminate information about measures actually taken to address the problems that led to the identification of a school for improvement, corrective action, or restructuring. Districts are free to provide additional information on the process that led to the adoption of such measures if they believe such information will support school improvement efforts.

Changes: None.

Section 200.39 Responsibilities Resulting From Identification for School Improvement

Comment: One commenter expressed concern that proposed § 200.39(a)(1)(i)

potentially misleads students and their families by suggesting that all students in schools identified for improvement will have the option to transfer to a better-performing school, when in fact the ESEA requires LEAs to give priority to the lowest-achieving students from low-income families in providing public school choice options.

Discussion: The regulation, like the statute, does indeed require that LEAs provide a public school choice option to all eligible students, defined as all students—regardless of achievement or family income—enrolled in a school identified for improvement, corrective action, or restructuring. The statutory priority on the lowest-achieving students from low-income families is a priority in providing transportation, as well as in making assignments to the family's preferred choice among available schools. It is not an invitation to LEAs to limit choice to only those students.

Changes: None.

Section 200.40 Technical Assistance

Comment: One commenter recommended that all technical assistance providers comply with the requirements of Title II of the Higher Education Act of 1965 (HEA), which requires institutions of higher education that conduct teacher preparation programs and receive Federal financial assistance under the HEA to issue reports on the ''pass rates'' of their teacher education graduates on State certification and licensure assessments, as well as on other aspects of their teacher education programs.

Discussion: The requirements in Title II of the Higher Education Act do not apply to other private organizations or to technical assistance providers.

Changes: None.

Comment: One commenter recommended that an LEA be required to ''publicly identify'' any entities providing technical assistance when it identifies a school for improvement.

Discussion: The ESEA requires only that an LEA ''ensure the provision of technical assistance as the school develops and implements'' its improvement plan. In addition, the improvement plan must include a description of the technical assistance to be provided by the LEA. This suggests that information on the precise nature of the technical assistance required, as well as the identity of the providers, is unlikely to be available at the time of identification.

Changes: None.

Comment: One commenter observed that the proposed regulations are inconsistent with the statutory requirements governing technical assistance to schools identified for improvement, particularly with regard to the goals of such technical assistance.

Discussion: The Secretary agrees that the proposed regulations inadvertently omitted the statutory reference to technical assistance in identifying and addressing any failure of the LEA or school in implementing the school plan.

Changes: Section 200.40(c)(1) has been amended to restore the omitted reference to technical assistance regarding LEA and school fulfillment of responsibilities under the school plan.

Section 200.41 School Improvement Plan

Comment: One commenter requested that the parental consultation requirement in § 200.41(a)(2) include a reference to a similar requirement in section 1118 of the ESEA.

Discussion: The Secretary believes that both the ESEA and the proposed regulations are unambiguous in requiring schools to consult with parents in developing or revising their school improvement plans, and that further clarification is unnecessary.

Changes: None.

Comment: One commenter suggested that the required consultation with parents, school staff, the LEA, and outside experts should take the form of written comments that are included in the school improvement plan.

Discussion: The ESEA does not require schools to seek comments in written form as part of the consultation process, but also does not preclude such an approach. The final regulations maintain this flexibility, which helps to ensure that school improvement planning is focused on results, not process.

Changes: None.

Comment: One commenter objected to the proposed regulation requiring school improvement plans to include ''measurable goals'' rather than the ''annual, measurable objectives'' terminology employed by the ESEA.

Discussion: The Secretary believes that the term ''annual, measurable objectives'' used in section 1116(b)(3)(A)(v) of the ESEA is ambiguous and, in particular, risks unintentional confusion with the annual measurable objectives required by § 200.18 as part of the definition of AYP. The substitution of the term ''measurable goals'' is intended to clarify that schools must set their own separate, interim performance goals that will contribute to the attainment of the annual measurable objectives required to make AYP and gain removal from improvement status.

Changes: None.

Comment: Two commenters requested that schools identified for improvement be permitted to use both Part A and non-Part A funds to satisfy the requirement in § 200.41(c)(5) that such schools spend not less than 10 percent of their part A allocation on professional development designed to help remove the school from improvement status.

Discussion: The proposed regulations accurately reflect the specific language of the ESEA, and the Secretary has no authority to modify this requirement.

Changes: None.

Comment: One commenter requested the addition of a reference to section 1119 of the ESEA in proposed § 200.41(c)(5), which outlines the requirements for school improvement-related professional development.

Discussion: The Secretary modified the statutory reference to section 1119 of the ESEA because this provision specifically covers professional development intended to ensure that all teachers are highly qualified, and not professional development designed to help remove a school from school improvement status.

Changes: None.

Comment: One commenter objected to the omission of the statutory requirement for an explanation of how funds reserved for professional development will be used to remove a school from improvement status, which in the proposed regulations was reflected only in a requirement for an assurance that such funds would ''contribute to removing the school from school improvement status.''

Discussion: The Secretary agrees that the proposed regulations could have inadvertently weakened the requirement for a firm commitment on the use of professional development funds in school improvement plans.

Changes: Section 200.41(c)(6) of the final regulations requires a school to specify how it will use its 10 percent reservation of Part A funds to gain removal from improvement status.

Comment: One commenter objected to the requirement that school improvement plans incorporate teacher mentoring programs.

Discussion: The Secretary has no authority to remove this requirement, which is specifically provided for in the ESEA. However, the final regulations clarify that the intention is to include teacher mentoring programs as a necessary element of the professional development provided as part of the school improvement plan.

Changes: The requirement for teacher mentoring programs has been moved to

§ 200.41(c)(5)(iii) of the final regulations.

Comment: One commenter objected to the omission of the notice requirement from the proposed regulation on school improvement plans.

Discussion: The notice requirement was omitted from proposed § 200.41 both because it concerned the initial identification for improvement, which in most cases will precede the development of the school improvement plan, and because it was included in proposed § 200.37, which covers all of the various statutory notice requirements related to the school improvement process. The Secretary agrees with the commenter, however, that it is important for the school improvement plan to describe how the school will notify parents of the identification for improvement.

Changes: Section 200.41(c)(7) requires the school improvement plan to include a description of how notice of identification for improvement will be provided to parents.

Section 200.42 Corrective Action

Comment: One commenter expressed concern that some of the corrective actions described in the proposed regulations may conflict with State charter school laws.

Discussion: Section 200.42(a) includes a range of corrective action options and requires any action taken to be ''consistent with State law.'' Where certain corrective actions specified in the ESEA and regulations conflict with State charter school laws, LEAs are not required to adopt those actions.

Changes: None.

Comment: One commenter requested clarification of the role of school support teams in providing technical assistance during corrective action.

Discussion: As described in § 200.42(b)(2), the LEA must continue to make available technical assistance, whether provided through school support teams or through some other mechanism, that meets the requirements of § 200.40.

Changes: None.

Comment: One commenter requested explanation of the proposed regulations regarding the appointment of an outside expert as a corrective action.

Discussion: The ESEA includes, as one of the corrective actions that may be taken by an LEA, the appointment of an outside expert ''to advise the school on its progress toward making AYP, based on its school plan under paragraph (3).'' The school plan cited in the statute, however, is the school improvement plan developed after initial identification for improvement and covering the two years of improvement efforts prior to the identification for corrective action. Since it presumably was at least in part the failure of this plan to improve the performance of the school that led to identification for corrective action, the Secretary believed that rather than providing advice based on this plan, it would be more appropriate for the outside expert to assist in revising the plan and in implementing the revised plan. Accordingly, § 200.42(b)(4)(iv) requires this approach when an LEA appoints an outside expert as a corrective action.

Changes: None.

Section 200.43 Restructuring

Comment: Three commenters requested clarification of the status of a school that has implemented a restructuring plan. One recommended that it be treated as a new school, and one asked whether such a school would be required to offer choice and supplemental educational services to its students.

Discussion: The ESEA does not address the status of a school that has implemented a restructuring plan. However, section 1116(b)(12) of the statute requires an LEA to remove a school from improvement, corrective action, or restructuring status only after the school has made AYP for two consecutive school years. The Secretary believes that the best interpretation of this language as it applies to a restructured school is that such a school remains ''in improvement'' until it makes AYP for two consecutive school years. For this reason, the LEA serving a restructured school must continue to provide public school choice options and make available supplemental educational services to eligible students enrolled in the school until the school makes AYP for two consecutive school years.

Changes: Section 200.43(c)(2) of the final regulations requires an LEA to provide public school choice options and make available supplemental educational services to students enrolled in a restructured school until the school makes AYP for two consecutive school years.

Comment: One commenter recommended that any entity selected to operate a school as part of a restructuring plan be required to demonstrate financial stability.

Discussion: The ESEA and proposed regulations require only that such an entity have a ''demonstrated record of effectiveness.'' States and LEAs, which presumably will enter into a contract with the entity, may identify other requirements or standards that the entity must meet. The ESEA requires that restructuring options be implemented ''consistent with state law.''

Changes: None.

Section 200.44 Public School Choice

Comment: One commenter requested clarification regarding LEA flexibility in providing public school choice options to students enrolled in schools identified for improvement, including whether an LEA may, in view of capacity constraints, offer choice to students only at some and not all of the schools it has identified for improvement.

Discussion: Both the ESEA and the proposed regulations clearly require, except where State law prohibits, LEAs to offer all students enrolled in all schools identified for improvement the option of transferring to another public school that has not been identified for improvement.

Changes: None.

Comment: Several commenters maintained that existing overcrowding of schools, teacher shortages, transportation difficulties, class-size limits, health and safety concerns, and other capacity issues prevent many LEAs from implementing the public school choice option in accordance with the requirements of § 200.44. One commenter, for example, recommended that the final regulations permit LEAs to preclude transfers to schools that have reached their ''maximum instructional capacity under State or local laws or ordinances.'' Another asked whether a State law limiting class size would permit an LEA to limit choice on the basis of the ''State law prohibition'' in § 200.44(a)(5).

Discussion: In general, as the Secretary has made clear in *Dear Colleague* letters, nonregulatory guidance, proposed regulations, and other policy statements, the ESEA does not permit an LEA to preclude choice options on the basis of capacity constraints. Rather, the statute requires an LEA to take measures to overcome issues such as overcrowding, class size limits, and health and safety concerns, that otherwise might prevent the LEA from complying with Title I public school choice requirements. This could mean, for example, adding classes and hiring additional teachers so that the LEA can offer choices to students while adhering to State-mandated class size limits.

In addition, LEAs have broad latitude in determining the schools to which students can transfer. They may, for example, consider health and safety factors in providing transfer options to

students and their parents. Such factors do not permit an LEA, however, to simply avoid its obligation to provide public school choice options as required by section 1116 of the ESEA. The expectation is that LEAs will need to find ways to provide choice, consistent with their obligations to provide a healthy and safe learning environment.

Changes: Section 200.44(d) of the final regulations clarifies that an LEA may not use lack of capacity to deny an eligible student the opportunity to transfer to another school not identified for improvement.

Comment: Two commenters requested that the final regulations include language permitting LEAs to limit the availability of choice options to comply with ''health and safety code requirements regarding facility capacity.''

Discussion: In implementing the public school choice requirements, an LEA must provide parents of students eligible to transfer a choice of more than one school if more than one school is available. The LEA is not required, however, to make available every school in the district. Rather, the LEA may take into consideration factors such as health and safety requirements or transportation costs in determining which schools in the district would be available to accept transfer students. Such factors may not be used, however, to deny students the opportunity to transfer to any other school.

Changes: Section 200.44(d) of the final regulations makes clear that an LEA may not use lack of capacity to deny an eligible student the opportunity to transfer to another school not identified for improvement.

Comment: One commenter recommended that the final regulations permit LEAs to offer supplemental educational services to those students whose transfer requests cannot be accommodated due to capacity constraints.

Discussion: Section 200.44(g)(2) of the final regulations permits an LEA with no eligible schools to which a student may transfer to offer supplemental educational services to eligible students enrolled in schools identified for their first year of improvement. However, since neither the ESEA nor § 200.44(d) of the final regulations permits an LEA to deny public school choice options to eligible students due to capacity constraints, there is no reason to offer supplemental educational services in lieu of choice under the circumstances suggested by the commenter.

Changes: None.

Comment: One commenter noted that some States and school districts currently operate public school choice plans and asked whether the new law requires additional choices beyond those already provided.

Discussion: If an existing choice plan meets the requirements of § 200.44, then the LEA is already in compliance with the ESEA. In most cases, however, the Secretary believes that it will be necessary to modify existing choice plans to meet these requirements, which include, for example, the provision of transportation, a choice of more than one school, and a priority for the lowest-achieving students from low-income families.

Changes: None.

Comment: One commenter expressed concern that proposed § 200.44(a)(2), which would require LEAs to offer choice ''not later than the first day of the school year following the year in which the LEA administered the assessments that resulted in the identification of the school for improvement, corrective action, or restructuring,'' could require mid-year implementation of choice that would lead to major disruptions in both sending and receiving schools.

Discussion: Proposed § 200.44(a)(2) is based on the clear language of section 1116(b)(1)(E)(i) of the ESEA, which assumes SEA and LEA compliance with the equally clear statutory identification timeline. SEAs and LEAs that adhere to this timeline will not face the additional challenge of implementing the public school choice requirements of § 200.44 in the middle of a school year. The Secretary does not believe it is appropriate, however, to reward LEAs that do not comply with the law by permitting them to postpone their obligations under § 200.44 until the following school year and thereby deny students attending identified schools the opportunity to transfer immediately to a better school.

Changes: None.

Comment: One commenter noted that States and school districts may have their own ''improvement'' designations based on different criteria than those provided under section 1116 of the ESEA. For this reason, the commenter requested clarification that the standard proposed under § 200.44(a)(3)(i)(A) limits transfers to schools that have not been identified for improvement, corrective action, or restructuring under Title I.

Discussion: The Secretary agrees that the proposed regulations did not clearly reflect the statutory requirement under section 1116(b)(1)(E)(i) of the ESEA that an LEA provide a public school choice option ''that has not been identified for school improvement under this paragraph.'' The phrase ''under this paragraph'' expressly limits the exclusion from eligible choice options of schools identified under section 1116(b)(1) of the ESEA, and does not rule out schools that may have been identified for improvement under other State or local criteria as possible schools to which students may transfer.

Changes: The final regulations specify that transfers are limited to schools that have not been identified under §§ 200.32 through 200.34.

Comment: Two commenters requested clarification that proposed § 200.44(a)(3)(ii) refers only to public charter schools that are served by the LEA.

Discussion: The Secretary believes that both the ESEA and the regulations are clear in requiring choice only within LEAs. The precise relationship between public charter schools and LEAs, however, varies widely and is better addressed through nonregulatory guidance.

Changes: No change.

Comment: Several commenters objected to proposed § 200.44(a)(4)(i), which requires LEAs to offer parents of eligible students the choice of more than one school that is not identified for improvement, corrective action, or restructuring. The commenters argued that this requirement is inconsistent with both the NCLB Act and the Secretary's overall goal of regulating only where necessary to provide clarity or flexibility.

Discussion: The Secretary believes that the principle and intent of choice embodied in the NCLB Act has meaning only if parents and students have the ability to choose from more than one public school choice option. One school is effectively no choice. Choice implies, at a minimum, the opportunity to choose between at least two better-performing schools. However, the regulations do not prohibit an LEA from limiting choice options on the basis of such factors as transportation arrangements, so long as it provides more than one option to students enrolled in schools identified for improvement, corrective action, or restructuring.

Changes: None.

Comment: One commenter requested clarification as to whether an LEA may limit the number of schools to which a student may transfer on the basis of such factors as transportation arrangements, so long as the LEA provides parents and students more than one option from which to choose.

Discussion: The Secretary has issued nonregulatory guidance explaining that LEAs are indeed permitted to take into account logistical concerns, such as

transportation, in limiting the range of available choices to students exercising an option under § 200.44.

Changes: None.

Comment: One commenter recommended deletion of proposed § 200.44(a)(4)(ii), which requires LEAs to ''take into account'' parent preferences in making final assignments among public school choice options offered to students attending schools identified for improvement, corrective action, and restructuring. The commenter noted that this provision is not included in the ESEA and ''interferes with the local control of school systems.''

Discussion: The Secretary recognizes that the final decision regarding student assignment among available choices rests with the LEA, but believes that meaningful choice requires that LEAs take into account parental preferences.

Changes: None.

Comment: One commenter requested clarification of the eligibility for choice and supplemental educational services of students who plan to attend, but are not yet enrolled in, a school for which an LEA must provide such options.

Discussion: The answer to this question depends in large part on State and local definitions of ''enrollment,'' but the Secretary believes that in general LEAs should provide new students the same options offered to existing students at a given school.

Changes: None.

Comment: One commenter requested clarification of the limitation on the State law prohibition in § 200.44(b), including examples of improper application of the prohibition.

Discussion: Section 1116(b)(1)(E)(i) of the ESEA requires an LEA to provide public school choice to any student in a school identified for improvement, unless such public school choice is prohibited by State law. Section 200.44(b) of the final regulations clarifies that an LEA may invoke the State law exception only if the State law prohibits choice through restrictions on public school assignments or student transfers among schools. Such a State law could explicitly prohibit an LEA from permitting students to transfer to other public schools or it could, for example, enforce desegregation by restricting transfers in such a way that effectively makes choice impossible. A State law that limits class size, however, is not a State law prohibiting choice, because an LEA could add teachers to meet class size requirements and still permit students to transfer.

Changes: None.

Comment: Several commenters objected to the language in proposed § 200.44(c)(3) requiring LEAs to ''secure appropriate changes'' to desegregation plans to permit compliance with the public school choice requirements of § 200.44. Commenters noted that LEAs could only seek such changes and only courts or the responsible agencies could grant the changes. In addition, two commenters were concerned that this provision may impose the burden and expense of protracted litigation on LEAs.

Discussion: Nothing in the proposed regulations or these final regulations provides an LEA with the authority to violate an applicable desegregation plan; rather, § 200.44(c)(1) holds that the existence of a desegregation plan does not exempt an LEA from the public school choice requirements of § 200.44. In addition, § 200.44(c)(2) states that an LEA may take into account the requirements of its desegregation plan in determining how to implement a transfer option. An LEA is required to ''secure appropriate changes'' from the court only if it is unable to implement the choice requirement consistent with the plan. The Department of Education anticipates that courts and responsible agencies will recognize the benefits of allowing students to transfer from schools identified as needing improvement and will grant amendments to desegregation plans permitting such transfers. If a court or responsible agency denies an LEA's request to amend its desegregation plan to allow for choice, then the LEA should contact the Department of Education. It is not the Secretary's intent to deny Title I funding to an LEA that in good faith takes appropriate action to seek amendments to the desegregation plan in order to comply with the public school choice requirements of § 200.44.

Changes: None.

Comment: One commenter recommended that LEAs be permitted to limit eligible students to a single public school choice option, rather than the multiple options required by § 200.44(a)(4)(i), in order to support the goals of existing desegregation plans.

Discussion: Section 1116(b)(1)(E)(i) of the ESEA requires an LEA with Title I schools identified for improvement to provide students in those schools the opportunity to transfer to a school not identified for improvement. Consistent with § 200.44(a), eligible students must have the opportunity to express a preference among at least two eligible schools and that preference must be considered by the school district in making their assignment. An LEA may take into account the requirements of its desegregation plan in determining how to implement the transfer option. If its desegregation plan offers no opportunity for the LEA to implement the choice requirement consistent with the plan, the LEA would need to secure appropriate changes from the court.

Changes: None.

Comment: One commenter maintained that compliance with the priority in § 200.44(d), and a similar priority for supplemental educational services in § 200.45(d), will require students to re-apply annually for a public school choice option to ensure equity in the context of limited funding for choice-related transportation and supplemental educational services.

Discussion: The Secretary understands the concerns of the commenter, but notes that § 200.44(f) contains the statutory requirement permitting students who exercise a public school choice option to remain in the new school until the student has completed the highest grade in that school. For this reason, the Secretary believes that the priority in § 200.44(d) was intended to apply only to students requesting a choice option for the first time, not those who have already exercised such an option. As for the commenter's similar concern regarding supplemental educational services, § 200.45(b)(3) requires LEAs to make such services available only until the end of the school year in which they are first provided, a limitation that mandates annual re-application for such services.

Changes: None.

Comment: One commenter recommended that the Department regulate the State role in encouraging cooperative agreements between LEAs to make available choice to students in LEAs in which all schools have been identified for improvement, corrective action, or restructuring.

Discussion: While the Secretary agrees that it would helpful, and consistent with the spirit of the NCLB Act, for States to encourage cooperative agreements between LEAs that would increase the availability of public school choice options, it would be inappropriate to regulate in this area of State authority.

Changes: None.

Comment: One commenter recommended setting geographic limits on the distance between LEAs that arrange cooperative agreements for the purpose of expanding public school choice options available to students enrolled in schools identified for improvement, corrective action, or restructuring.

Discussion: The Secretary believes that geographic limits are the kind of issue the authorizers intended to

address when they called for such cooperative agreements ''to the extent practicable,'' a limitation that is repeated in § 200.44(h)(1).

Changes: None.

Comment: One commenter requested clarification as to whether ''receiving school districts,'' presumably under a cooperative agreement such as that provided for under § 200.44(h)(1), would be permitted to refuse to accept certain students, such as students with disabilities who might require special services and support.

Discussion: All public school districts, as recipients of Federal financial assistance, must comply with applicable Federal civil rights requirements, including those under Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973 (Section 504), and Title II of the Americans with Disabilities Act of 1990 (ADA).

Changes: None.

Comment: One commenter objected to § 200.44(h)(2), which permits LEAs with no eligible schools to which a student may transfer to offer supplemental educational services in lieu of choice to students enrolled in schools identified for their first year of improvement. The commenter stated that the proposed regulations go beyond the scope of the statute.

Discussion: The proposed regulations are consistent with the NCLB Act's emphasis on increasing educational options for all students attending low-performing schools. The proposed regulations do not create a new authority, but merely highlight an existing one, since the provision of tutoring and other supplemental instructional services is already a permissible use of Federal funds as part of the regular Title I program in both schoolwide projects and targeted assistance schools. An LEA may implement any corrective action or restructuring measure earlier than what is required by the statute.

Changes: None.

Comment: One commenter suggested that if the transportation costs associated with public school choice become excessive, funds might be better used to pay for supplemental educational services.

Discussion: Section 200.44(h)(2) permits an LEA with no eligible schools to which a student may transfer to offer supplemental educational services to eligible students enrolled in a school in its first year of improvement. Neither the ESEA nor the regulations, however, allow an LEA to offer supplemental educational services in lieu of choice solely on basis of the costs incurred in providing choice in accordance with the requirements of § 200.44.

Changes: None.

Comment: Two commenters expressed concern that public school choice could require costly replication of specialized services for various student populations, including limited-English proficient and migrant students and students with disabilities.

Discussion: In order to provide public school choice, some school districts may need to make specialized services for special populations of students, such as limited-English proficient students and students with disabilities, available in other schools in order to provide those students with the opportunity to attend an eligible school, namely, a school that has not been identified for school improvement, corrective action or for restructuring, and that has not been identified by the State as persistently dangerous. However, in offering school choice, the school district has the flexibility to offer parents the option to enroll their child in eligible schools of choice that already provide the language or disability-related services needed by the student.

Changes: None.

Comment: One commenter expressed concern about the eligibility for choice and supplemental services of students who have been involuntarily transferred from Title I schools that are identified for improvement, corrective action, or restructuring.

Discussion: Generally, Title I affords parents of students in low-performing schools an option to choose a school that has not been identified for improvement for their child. There are a very few situations, however, that are handled differently. If a student is assigned to a particular school by a family court for child custody reasons and that school has been identified for improvement, the student could be eligible to transfer under the provisions in the ESEA. However, the student's parents may not be able to exercise that option without first obtaining permission from the court to move their child. In the case of a student assigned to a particular school by a juvenile court due to the student's violent or criminal behavior, or for disciplinary reasons sufficiently serious to justify placement in a particular learning environment, the LEA may limit or deny the choice option.

Changes: None.

Comment: Two commenters expressed concern that parental exercise of a choice option in the case of a student receiving special education services, without the approval of the student's Individualized Education Program (IEP) team, may constitute a unilateral change in placement under the IDEA that could violate the student's right to a free appropriate public education (FAPE).

Discussion: Under the IDEA, a change in the location of delivery of services, in and of itself, does not trigger the ''change of placement'' procedures of the IDEA. The LEA can allow the school of choice either to implement the IEP that the prior school developed for the new school year, or convene an IEP team meeting and develop a new IEP that meets the student's needs. If the LEA adopts the student's existing IEP, none of the ''change of placement'' procedures apply. However, the school district must comply with the ''change of placement'' requirements of the IDEA if the new IEP will change either the services in the IEP or the extent to which the student will participate with nondisabled students in academic and nonacademic activities. Similar rules apply to students who are covered only by Section 504 and Title II of the ADA.

Changes: None.

Comment: One commenter requested clarification that an LEA would be permitted to limit the choices of a student with a disability to those eligible schools with the capacity to provide the services required by the student's IEP.

Discussion: LEAs are not required to offer students with disabilities the same choices of schools as are offered to nondisabled students, but may match the abilities and needs of a student with a disability, as indicated on the student's IEP, to those schools that have the ability to provide FAPE to the student. However, school districts must offer students with disabilities and those eligible under Section 504 and Title II of the ADA the opportunity to be educated in an eligible school, namely, a school that has not been identified for school improvement, corrective action, or restructuring and that has not been identified by the State as persistently dangerous. Like other students, students with disabilities and those covered by Section 504 and Title II of the ADA must have the opportunity to express a preference among at least two eligible schools and that preference must be considered by the school district in making their assignment.

Changes: None.

Section 200.45 Supplemental Educational Services

Comment: Two commenters expressed concern that proposed § 200.45(b)(1) goes beyond the NCLB Act in requiring LEAs to ''arrange'' for each eligible student to receive

supplemental educational services, rather than ''make available'' such services at the request of parents.

Discussion: The ESEA requires LEAs that are identified for a second year of improvement or subject to corrective action or restructuring to ''make supplemental services available'' in accordance with section 1116(e) of the statute. Section 1116(e)(1) requires such LEAs to ''arrange for the provision of supplemental educational services to eligible children in the school from a provider with a demonstrated record of effectiveness, that is selected by the parents.'' The proposed regulations are consistent with this statutory language.

Changes: None.

Comment: One commenter urged the Secretary to issue ''clarifying regulations and guidance'' encouraging States and LEAs to promote maximum participation by providers that utilize distance-learning technologies.

Discussion: The Secretary recognizes the potential value of technology as a means to overcome geographic and cost barriers to the universal availability of high-quality supplemental educational services, particularly in poor urban and rural areas where it is reasonable to expect there will be the greatest demand for such services. This is why § 200.37(b)(5)(i)(A) requires the LEA's annual notice of the availability of supplemental educational services to specifically include providers of technology-based or distance-learning services, when such providers are on the SEA's list. However, the ESEA does not give the Secretary authority to promote one type of provider over another; rather, it places responsibility for promoting participation by the maximum number of providers on SEAs, which must develop standards for approving providers and maintain an updated list of approved providers from which parents may select. Unless evidence emerges that the State approval process presents barriers to participation by technology-based or distance-learning providers, the Secretary believes there is no need for further regulations on this issue.

Changes: None.

Comment: One commenter requested additional language in proposed § 200.45(b)(4)(i)(A) requiring an SEA, before granting a waiver from the requirement to provide supplemental educational services, to determine that the providers on its approved list makes services available within the LEA requesting the waiver through technology-based or distance-learning methods.

Discussion: The proposed regulations require the SEA to determine that none of the providers on its list makes available supplemental educational services to students served by the LEA before granting a waiver from the requirement to provide such services. Since the SEA's list presumably will include providers using technology-based or distance-learning methods, no additional language is needed.

Changes: None, except that the final regulation has been renumbered as § 200.45(c)(4)(i)(A).

Comment: One commenter maintained that since any transportation costs related to supplemental educational services would strain ''already tight school budgets,'' the final regulations should encourage the use of school-based services wherever possible.

Discussion: The Secretary appreciates the concern of the commenter, and acknowledges the potential benefits of providing supplemental educational services at the school site. However, the ESEA unambiguously leaves the selection of services up to the parents of eligible students.

Changes: None.

Section 200.46 LEA Responsibilities for Supplemental Educational Services

Comment: One commenter recommended that the regulations clarify that for students with disabilities, supplemental educational services must ''continue to meet the goals and objectives of the IEP.''

Discussion: For a student with disabilities, the supplemental educational services agreement must include a statement of specific achievement goals for the student, a description of how the student's progress will be measured, and a timetable for improving achievement, that are consistent with the student's IEP. However, the supplemental educational services do not also have to meet the goals and objectives of the IEP.

Changes: Section 200.46(b)(3) of the final regulations clarifies that each of the provisions of the statement included in the supplemental educational services agreement, and not just the timetable for improving achievement, must be consistent with the student's IEP or individualized services under Section 504.

Comment: One commenter requested clarification of the relationship of supplemental educational services to Individualized Education Programs (IEPs) under IDEA or individualized services under a section 504 plan, out of concern that if such services are written into these plans, they could be subject to challenge in a due process proceeding.

Discussion: § 200.46(b)(2)(i)(c) requires supplemental educational services to be ''consistent'' with IEPs and section 504 services, but these services are provided in addition to the instruction and services provided during the school day under the IEP or Section 504 plan and are not considered part of IEPs or section 504 plans.

Changes: None.

Comment: One commenter requested that the regulations provide an exemption from restrictions under the Family Educational Rights and Privacy Act to permit the sharing of IEP and section 504 plans with supplemental educational services providers.

Discussion: Under the Family Educational Rights and Privacy Act (FERPA), parental consent must be obtained before developing the supplemental services agreements provided for in section 1116(e)(3) of the ESEA and § 200.46(b), without regard to whether a particular student is a student with disabilities or a nondisabled student, because all supplemental services agreements will require the LEA to share information from education records with the services provider. Therefore, an exemption for students with IEPs or Section 504 plans is not appropriate.

Changes: None.

Comment: One commenter recommended strengthening proposed §§ 200.46(a)(4) and 200.47(a)(5) by adding language ensuring that eligible students with disabilities and students covered under section 504 of the Rehabilitation Act of 1973 ''are provided with equal access to each provider.''

Discussion: The Secretary has determined that no change is necessary. Sections 200.46(a)(4) and 200.47(a)(5) of the final regulations must be read consistent with the requirements of Section 504 and Title II of the ADA. Under Section 504, SEAs and LEAS, as recipients of Federal financial assistance, have responsibility for ensuring that there is no discrimination in the supplemental services program. SEAs and LEAS have similar duties under Title II of the ADA, which applies to public entities. In particular, SEAs and LEAs must ensure that students with disabilities and students covered by Section 504 receive appropriate supplemental educational services and necessary accommodations in the provision of those services. Consistent with this duty, LEAs may not, through contractual or other arrangements with private providers, discriminate against a student with a disability by failing to provide for appropriate supplemental educational services with necessary

accommodations. Such services and necessary accommodations must be available, but not necessarily from each provider. Rather, SEAs and LEAs are responsible for ensuring that the supplemental educational service providers made available to parents include some providers that can serve students with disabilities and students covered under Section 504 with any necessary accommodations, with or without the assistance of the SEA or LEA. If no provider is able to make the services with necessary accommodations available to a student with a disability, the LEA would need to provide these services, with necessary accommodations, either directly or through a contract.

Changes: None.

Comment: In giving further consideration to the proposed regulations during the review of public comments, the Secretary noted that while proposed § 200.46(a)(4) required an LEA to ensure that eligible students with disabilities and students covered under Section 504 receive appropriate supplemental educational services and accommodations in the provision of those services, the proposed regulations were silent on the LEA's obligation to ensure the provision of appropriate services, including any necessary language assistance, to students with limited English proficiency.

Discussion: Eligible students are entitled to supplemental educational services regardless of their English proficiency and, in fact, some students may need such services due to their limited English proficiency. Under § 200.20, each LEA is required to report on the annual yearly progress of each subgroup, including students with limited English proficiency. Additionally, under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, an LEA implementing the Title I program is prohibited from discriminating against students with limited English proficiency. For these reasons, the final regulations include new language emphasizing an LEA's responsibility to ensure that the supplemental education providers made available to parents include some who can serve students with limited English proficiency, with or without the assistance of the LEA.

Changes: Section 200.46(a)(5) of the final regulations require LEAs to ensure that students who have limited English proficiency receive appropriate supplemental educational services and language assistance in the provision of those services.

Comment: One commenter asked whether an LEA may identify and approve providers of supplemental educational services if an SEA fails to provide a list of approved providers in a timely manner.

Discussion: The ESEA does not authorize an LEA to identify and approve providers of supplemental educational services except, as described under section 1116(e)(11), when State law prohibits an SEA from carrying out this responsibility. In general, the Secretary would consider an SEA that fails to provide a list of approved providers in a timely manner to be out of compliance with the statute, and would take action to bring the SEA into compliance and ensure that LEAs can arrange for eligible students to receive supplemental educational services.

Changes: None.

Comment: One commenter asked whether LEAs are permitted to establish additional criteria for supplemental educational service providers on the SEA's list.

Discussion: With the narrow exception in § 200.46(c), the ESEA clearly assigns authority for identifying and approving supplemental service providers to the SEA. LEAs, which also may serve as providers and thus would face a potential conflict of interest in setting additional barriers to participation by SEA-approved providers, are not permitted to set additional criteria or otherwise modify the list of providers made available by the SEA.

Changes: None.

Section 200.47 SEA Responsibilities for Supplemental Educational Services

Comment: One commenter expressed concern that proposed § 200.47(a)(3), which requires SEAs to ''maintain by LEA an updated list of approved providers from which parents may select,'' could inadvertently lead to the exclusion of technology-based or distance-learning providers located outside the LEA.

Discussion: The Secretary agrees that the language of the proposed regulations could be misconstrued to exclude technology-based or distance-learning providers.

Changes: Final § 200.47(a)(3) includes additional language requiring the updated LEA lists of providers to include technology-based and distance-learning providers serving the respective LEAs.

Comment: None.

Discussion: In giving further consideration to the proposed regulations during the review of public comments, the Secretary noted that while proposed § 200.47(a)(5) requires an SEA to ensure that eligible students with disabilities and students covered under Section 504 receive appropriate supplemental educational services and accommodations in the provision of those services, the proposed regulations were silent on the SEA's obligation to ensure the provision of appropriate services, including any necessary language assistance, to students with limited English proficiency.

Eligible students are entitled to supplemental educational services regardless of their English proficiency and, in fact, some students may need such services due to their limited English proficiency. Under § 200.21, each SEA is required to report on the annual yearly progress of each subgroup, including students with limited English proficiency. Additionally, under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, an SEA implementing a Title I program is prohibited from discriminating against students with limited English proficiency. For these reasons, the final regulations include new language emphasizing an SEA's responsibility to ensure that the supplemental education providers made available to parents include some who can serve students with limited English proficiency, with or without the assistance of the SEA.

Changes: Section 200.47(a)(6) of the final regulations requires SEAs to ensure that students who have limited English proficiency receive appropriate supplemental educational services and language assistance in the provision of those services.

Comment: One commenter expressed concern over the exclusion of educational service agencies from the list of potential providers in proposed § 200.47(b)(1). The commenter noted that such agencies may be considered LEAs under section 9101(26) of the NCLB Act.

Discussion: The Secretary agrees that it is appropriate to clarify that educational service agencies may be supplemental educational service providers.

Changes: Educational service agencies have been added to the definition of entities eligible to be supplemental educational service providers in § 200.47(b)(1).

Comment: Several commenters objected to proposed § 200.47(b)(1)(iv), which would prohibit States from approving as a supplemental service provider any school that has been identified for improvement, corrective, or restructuring. Commenters asserted that this restriction would prevent some identified schools that operate ''very effective'' after-school programs from serving as providers, complicate efforts

to make services available on school grounds, and limit the availability of providers in poor and rural communities.

Discussion: The Secretary believes that schools that are identified for improvement or subjected to corrective action or restructuring need to be focused on carrying out comprehensive efforts to make in helping all student meet challenging State academic achievement standards, and not divert staff and other resources to the creation and operation of supplemental educational service programs. Though the proposed regulations excluded only identified schools as service providers, the same concerns apply to LEAs identified for improvement or corrective action. The purpose of supplemental educational services—increasing the academic achievement of eligible children on State assessments and helping them attain proficiency in meeting the State's academic achievement standards—is not well served if students obtain such services from an entity that is demonstrably failing to achieve those goals as shown by a consistent inability to make AYP. The final regulations do not hinder in any way the ability of a provider to offer services on school grounds or in LEA facilities. Finally, the success of supplemental educational services depends not merely on the availability of services, but on the availability of high-quality services that meet student needs. The Secretary believes there will be sufficient incentive for independent providers or potential providers, including those offering technology-based or distance-learning services, to offer such services in poor urban and rural communities.

Changes: Section 200.47(b)(1)(v) has been added to clarify that an LEA that has been identified for improvement or corrective action is not eligible to be a supplemental educational services provider.

Comment: One commenter supported proposed § 200.47(b)(1)(iv), which would prohibit States from approving as a supplemental service provider any school that has been identified for improvement, corrective action, or restructuring. However, the commenter requested clarification that highly qualified teachers employed by such schools are eligible to provide such services.

Discussion: The final regulations do not restrict in any way the ability of a highly qualified teacher employed by a school identified for improvement, corrective action, or restructuring from forming an entity that would serve as a supplemental educational services provider, or from working for such an entity.

Changes: None.

Comment: One commenter expressed concern that the purpose and quality of supplemental educational services may be undermined if providers are permitted to hire as instructors staff who teach at schools identified for improvement, corrective action, or restructuring.

Discussion: The Secretary understands the concern of the commenter, but believes that even the lowest-performing schools may have teachers who have the experience and skill to provide high-quality supplemental educational services. In addition, the Secretary has no authority to limit contractual agreements between teachers and other entities.

Changes: None.

Comment: One commenter recommended that the regulations encourage SEAs to include input from parents in developing standards for approving and monitoring supplemental educational service providers.

Discussion: The ESEA neither requires nor precludes participation by parents in the process of approving and monitoring supplemental educational service providers, and SEAs that wish to include parents in this process are free to do so.

Changes: None.

Comment: Several commenters maintained that proposed § 200.47(b)(3) could have permitted providers to exclude students with disabilities, based on the possibility of an ''arbitrary judgment'' regarding the ''minor adjustments'' required to serve them. Some commenters requested a definition of ''minor adjustments,'' including an explanation of who would pay for such adjustments, while others recommended that the final regulations simply prohibit providers from discriminating against any eligible student with a disability.

Discussion: The Secretary agrees with commenters that the proposed regulations potentially created confusion regarding the civil rights obligations that are applicable when students with disabilities and students covered by Section 504 and Title II of the ADA receive supplemental educational services. Under Section 504 and Title II, SEAs and LEAs have primary responsibility for ensuring that there is no discrimination in the provision of supplemental educational services. Thus, SEAs and LEAs are responsible for ensuring that the supplemental educational service providers made available to parents include some providers that can serve students with disabilities and students covered by Section 504 with any necessary accommodations, with or without the assistance of the SEA or LEA.

At the SEA level, this responsibility must involve efforts to identify and approve providers that will be available to serve these students with necessary accommodations. LEAs also are responsible for ensuring that supplemental services are available for students with disabilities and students covered by Section 504, and may have to provide services and necessary accommodations directly to these students in the absence of a private provider that is able to provide supplemental educational services with necessary accommodations.

Private supplemental service providers are not deemed recipients merely by virtue of their provision of these services and therefore are not covered under Section 504; nor are they covered under Title II of the ADA since they are not public entities. For this reason, proposed § 200.47(b)(3), which governed the obligations of private providers of supplemental educational services for students with disabilities and students covered by Section 504 and Title II of the ADA, has been removed from the final regulations. However, private providers may have certain responsibilities under Federal, State and local civil rights laws, and SEAs must ensure that providers fulfill these responsibilities as a condition of approval as a supplemental educational services provider. For example, private providers that are not religious entities must comply with the nondiscrimination requirements of Title III of the ADA (Title III).

Under Title III, which is enforced by the U.S. Department of Justice, private entities that are places of public accommodation (except for religious entities) must make reasonable modifications to their policies, practices, and procedures to ensure nondiscrimination on the basis of disability, unless to do so would fundamentally alter the nature of the program. Likewise, these providers must take those steps necessary to ensure that students with disabilities are not denied services or excluded because of the absence of auxiliary aids and services, unless taking those steps would fundamentally alter the nature of the services or would result in an undue burden (i.e., significant difficulty or expense). Private providers may also be subject to Title VII of the Civil Rights Act concerning discrimination in employment.

Changes: Proposed § 200.47(b)(3) has been removed from the final regulations.

Comment: Two commenters found proposed § 200.47(b)(3), which appears to permit providers to exclude some students with disabilities, to be inconsistent with proposed §§ 200.46(a)(4) and 200.47(a)(5), which require LEAs and SEAs to ensure that these students ''receive appropriate supplemental educational services and accommodations in the provision of those services.''

Discussion: The Secretary agrees with the commenters, as explained in the discussion of the previous comment.

Changes: Proposed § 200.47(b)(3) has been removed from the final regulation.

Comment: Several commenters objected to proposed § 200.47(b)(4)(i), which would prohibit States from requiring providers to hire staff who are highly qualified, as defined by §§ 200.55 and 200.56. The commenters argued that the proposed regulations are inconsistent with the letter and spirit of the NCLB Act, which prohibits Title I programs from hiring new teachers who are not highly qualified and requires States to adopt plans for ensuring that all public school teachers are highly qualified by 2005–2006.

Discussion: The Secretary believes that requiring supplemental educational service providers to use only highly qualified staff, as defined in the NCLB Act, would severely limit the availability of providers, particularly in poor urban and rural areas. For example, retired teachers might not be able to provide services through approved providers. States, LEAs, and schools receive substantial resources through Federal education programs that may be used to help ensure that all teachers are highly qualified. Because these resources are unavailable to supplemental service providers, few providers would be able to meet the same standard. In addition, unprecedented accountability requirements will help to ensure the quality of instruction offered by providers. All providers must have a ''demonstrated record of effectiveness'' to win approval by the SEA, must be selected by parents, must enter into agreements with specific achievement goals for each student, and must meet those goals to remain on the SEA's list of approved providers. Furthermore, parents of eligible students must request services annually, giving providers a strong incentive both to produce results as measured by improved achievement and to offer high-quality customer service to parents and students. Finally, even though States may not bar participation by providers who do not use only highly qualified staff, they would be permitted to indicate the qualifications of provider staff in information provided to parents.

Changes: None.

Comment: Several commenters also objected to proposed § 200.47(b)(4)(ii), under which States could not require, as a condition of approval, that supplemental educational service providers document that they use instructional strategies based on scientifically based research. The commenters believe that this proposal would have undermined one of the core principles of the NCLB Act, which requires the use of instructional strategies based on scientifically based research in nearly all of its authorities, including Part A of Title I.

Discussion: The use of instruction based on scientifically based research is indeed a core principle of the NCLB Act. It is absent, however, from the statutory definition of supplemental educational services, which refers only to services that are ''research-based.'' This term suggests that Congress intended a different standard to apply to supplemental educational services, one based on the unique accountability inherent in such services. However, the Secretary agrees that States should be permitted, but not required, to include the use of instruction grounded in scientifically based research in the criteria used to approve supplemental educational service providers.

Changes: Proposed § 200.47(b)(4)(ii) has been removed from the final regulations.

Section 200.48 Funding for Choice-Related Transportation and Supplemental Educational Services

Comment: A number of commenters raised objections to proposed § 200.48(a)(2), which covers funding requirements related to the provision of public school choice options and supplemental educational services. Their comments focused primarily on concerns that the proposed regulations were confusing and deviated from what commenters believed was the clear language of the ESEA.

Discussion: Proposed § 200.48(a)(2) reflects the Secretary's best interpretation of a section of the ESEA that includes ambiguous and sometimes contradictory provisions. This interpretation is based primarily on section 1116(b)(10)(A) of the statute, which states that ''Unless a lesser amount is needed to comply with paragraph (9) [choice-related transportation] and to satisfy all requests for supplemental educational services under subsection (e), a local educational agency shall spend an amount equal to 20 percent of its allocation under subpart 2 [Title I, Part A allocations]'' for choice-related transportation and supplemental educational services.

The primary effect of this provision, as described in proposed § 200.48(a)(2), is to clearly obligate an LEA to spend ''an amount equal to'' 20 percent of its allocation under subpart 2 on choice-related transportation, supplemental educational services, or a combination of the two, regardless of the actual source of the funds. The emphasis is on the amount that must be spent—an amount equal to 20 percent of its subpart 2 allocation—not the source of the funds. The final regulations maintain this requirement.

LEA discretion in spending such funds is limited by the requirement in section 1116(b)(10)(A)(i) and (ii) of the ESEA that an LEA spend an amount equal to 5 percent of its allocation under subpart 2 on choice-related transportation and 5 percent on supplemental educational services, assuming there is demand for both. In other words, if students require transportation to a school selected under § 200.44, and parents have requested supplemental educational services under § 200.45, the LEA does not have discretion to use the full 20 percent reservation on only one of these activities.

Proposed § 200.48(a)(2)(iii)(A), which was intended to prevent an LEA from using the entire 20 percent on choice-related transportation and ignoring demand for supplemental educational services, should have clarified that an LEA also is not permitted to use the entire amount for supplemental educational services and potentially deny choice to students by failing to provide or pay for choice-related transportation.

On the other hand, if there is demand for either choice-related transportation or supplemental educational services, but not both, the Secretary believes that section 1116(b)(10)(A) of the statute requires an LEA to spend the full 20 percent on the required activity, and not the maximum of 15 percent suggested by some commenters.

In addition, the claim by some commenters that section 1116(b)(10)(B) of the ESEA caps an LEA's spending on supplemental educational services at an amount equal to 5 percent of its allocation ignores the requirements of the introductory clause of section 1116(b)(10)(A) of the statute and the overall legislative context of this provision. Section 1116(b)(10)(B) appears to set such a cap, and thus

contradict the introductory clause of subparagraph (A), which requires the expenditure of an amount equal to 20 percent of an LEA's subpart 2 allocation ''to satisfy all requests for supplemental educational services under subsection (e).'' However, the plain language of section 1116(b)(10)(B) of the statute refers to a maximum amount to be spent on supplemental services ''under this part.'' ''[T]his part'' refers to the source of funds, which is Title I, Part A. Thus, the maximum amount that an LEA is required to spend out of its Title I, Part A funds is an amount equal to 5 percent of its allocation under subpart 2 of this part. Subparagraph (B) does not change or otherwise reduce the obligation under subparagraph (A) for an LEA to spend an amount equal to 20 percent of its subpart 2 allocation, but simply places a 5 percent limitation on the required use of Title I, Part A funds for this purpose. An LEA, for example, could use funds allocated under Part A of Title V of the ESEA to meet the remaining 15 percent requirement. However, the 5 percent limitation on the required use of Title I, part A funds for this purpose does not prevent an LEA, at its option, from using a higher percentage of Title I, part A funds for this purpose.

Finally, one commenter observed that the proposed regulations appear to ignore section 1116(b)(9) of the ESEA, which requires affected LEAs to provide or pay for choice-related transportation, without specifying either the source of funds or any limit on such costs. Section 1116(b)(9) must be read in context with section 1116(b)(10), which was negotiated during the House Senate conference committee meetings on the ESEA. Earlier versions of the bill had uniformly required transportation for all students exercising a choice option until all needs were met, while limiting the contribution of subpart 2 funds for transportation to 15 percent of an LEA's allocation. If transportation costs exceeded this 15 percent cap on subpart 2 funds, an LEA would have had to use other funds to pay the balance of the choice-related transportation costs. However, the final language of the NCLB Act required only the expenditure of an ''amount equal to 20 percent of its allocation under subpart 2,'' thereby extending the cap to funding from all sources and limiting the obligation to pay transportation costs until all needs were met.

Changes: The final regulations maintain the NPRM requirement in § 200.48(a)(2) that an LEA spend an amount equal to 20 percent of its Title I, part A allocation on choice-related transportation and supplemental educational services, unless a lesser amount is needed to meet the requirements of §§ 200.44 and 200.45. Section 200.48(a)(2)(iii)(A) has been amended to clarify that an affected LEA must spend a minimum of an amount equal to 5 percent of its allocation under subpart A for transportation required under § 200.44 and an identical amount for supplemental educational services under § 200.45, unless a lesser amount is needed to comply with all requests for choice-related transportation and supplemental educational services.

Comment: One commenter requested regulatory clarification that Title I, Part A funds may be used to pay the administrative costs associated with supplemental educational services.

Discussion: Section 1116(b)(10) of the ESEA requires an LEA to spend an amount equal to 20 percent of its Title I allocation for transportation costs related to public school choice and to provide supplemental educational services. This requirement establishes a minimum amount an LEA must spend on the actual supplemental educational services in order to make those services available to as many eligible students as possible. As a result, the Secretary has revised § 200.48(a)(2)(iii)(B) of the final regulations to make clear that an LEA may not include costs for administration or transportation incurred in providing supplemental educational services, or any administrative costs associated with the provision of public school choice options under § 200.44, in the amounts required to be spent to meet the requirements of section 1116(b)(10) of the ESEA. Such costs, however, are allowable Title I expenditures and may be taken off the top of the LEA's Title I allocation like other proper administrative costs.

Changes: Section 200.48(a)(2)(iii)(B) has been amended to clarify that administrative costs associated with providing supplemental educational services may not ''count'' toward meeting the minimum expenditure requirements in section 1116(b)(10) of the ESEA.

Comment: Two commenters objected to proposed § 200.48(a)(2)(iii)(B), which prohibits an LEA from including supplemental educational services-related administrative or transportation costs as part of the minimum 5 percent of an LEA's Part A allocation that must be spent on satisfying all requests for such services. One of the commenters asserted that since a provider would be permitted to include transportation costs in its fees, LEAs should be permitted to include similar costs under the 5 percent minimum.

Discussion: The ESEA is silent on the treatment of administrative or transportation costs associated with supplemental educational services. The Secretary believes, however, that the funds made available for supplemental educational services under § 200.48(a)(2) are intended to pay for actual services and not administrative or transportation costs. Funding limitations may restrict significantly the availability of supplemental educational services in many LEAs, and permitting LEAs to count administrative or transportation costs toward satisfying the funding requirements of § 200.48(a)(2) would only further reduce the number of students receiving supplemental educational services. In addition, the proposed regulations should have stated that an LEA may not use administrative or transportation costs related to supplemental educational services to satisfy any of the funding requirements of § 200.48(a)(2), and not just the 5 percent minimum requirements under § 200.48(a)(2)(iii)(A).

Changes: The final regulations clarify that LEAs may not include administrative or transportation costs associated with the provision of supplemental educational services in meeting the funding requirements of § 200.48(a)(2).

Comment: One commenter requested that the final regulations clarify that LEAs have fulfilled their responsibility to fund ''all requests for supplemental educational services'' once they have spent an amount equal to 20 percent of their Part A allocations on choice-related transportation, supplemental educational services, or a combination of the two.

Discussion: The Secretary believes that it is clear from the proposed regulations that an LEA's obligation to ''satisfy all requests for supplemental educational services'' is limited by available funding specified under § 200.48(a)(2). This limitation is explicitly acknowledged in proposed § 200.48(a)(3) and (4), which permit but do not require LEAs and SEAs to make available additional funding for choice-related transportation and supplemental educational services from other sources.

Changes: None.

Comment: One commenter requested that the final regulations permit the use of alternatives to census poverty estimates in calculating the per-child funding for supplemental educational services under proposed § 200.48(c).

Discussion: Section 1116(e)(6) of the ESEA explicitly requires an LEA to use census poverty estimates to calculate the per-child amount available for

providing supplemental educational services. The Department provides these estimates to each State when it makes annual Title I allocations, and thus they are available to each LEA. The Secretary has no authority to permit the use of alternative poverty data to determine the per-child amount available for supplemental educational services. We note, however, that an LEA does not use the census poverty estimates to identify those low-income students eligible for supplemental educational services. Rather, an eligible student is a student from a low-income family as determined by the LEA for purposes of allocating Title I funds to schools under section 1113 of the ESEA.

Changes: None.

Section 200.49 SEA Responsibilities for School Improvement, Corrective Action, and Restructuring

Comment: Several commenters recommended modifying proposed § 200.49(b)(2)(ii), which permits an SEA to use school improvement funds to directly provide school improvement activities ''if requested by an LEA,'' by returning to the language of section 1003(b)(2) of the ESEA, which permits SEA retention of such funds ''with the approval of the local educational agency.'' The proposed regulations could be interpreted as preventing a State from developing a cost-effective, statewide approach to supporting school improvement efforts absent a request from LEAs.

Discussion: The Secretary agrees that the proposed regulations could be subject to misinterpretation.

Changes: Section 200.49(b)(2)(ii) has been changed to permit SEAs to directly support school improvement activities ''with the approval of the LEA.''

Comment: One commenter expressed concern that while proposed § 200.49(e) requires SEAs to make the results of academic assessments in a given year available to LEAs before the beginning of the next school year, the inclusion of local assessments, over which SEAs have little or no authority, in State assessment systems may prevent SEAs from meeting this requirement.

Discussion: SEAs are responsible for ensuring that their State assessment systems, which may include local assessments, comply with all the requirements of the ESEA.

Changes: None.

Comment: One commenter expressed concern that charter schools, many of which enjoy LEA status or are treated as LEAs in the administration of Federal education programs, might not be subject to the rigorous accountability of the NCLB Act if they are effectively permitted to monitor themselves.

Discussion: Section 1111(b)(2)(K) of the ESEA recognizes the unique and varying circumstances of charter schools by requiring that accountability be overseen for charter schools in accordance with State charter school law. The Secretary agrees that the inclusion of this language in the final regulations would help clarify that while the accountability provisions of the NCLB Act apply to charter schools, they are not intended to expand the authority of SEAs or LEAs over charter school operations except to the extent authorized by State charter school law.

Changes: Section 200.49(f) of the final regulations incorporates the charter school accountability language of section 1111(b)(2)(K) of the ESEA.

Section 200.50 SEA Review of LEA Progress

Comment: One commenter requested clarification of the SEA review of LEA progress required by proposed § 200.50(a), which does not appear to include progress on other indicators, such as graduation rates.

Discussion: The Secretary agrees that proposed § 200.50(a)(1)(ii)(A) appears to require progress only in meeting State student academic achievement standards, rather than the broader definition of suggested by the statutory reference to section 1111(b)(2) of the ESEA.

Changes: Section 200.50(a)(1)(i) has been amended to require ''as defined under §§ 200.13 through 200.20,'' which includes progress on other academic indicators in the State plan.

Comment: Two commenters objected to the permissive authority in proposed §§ 200.50(d)(3) and (d)(4) to identify an LEA for improvement or remove an LEA from improvement, respectively, on the basis of 2001–2002 assessment data. The commenters interpret the ESEA as requiring the identification for improvement of any LEA that fails to make AYP for two consecutive years, as well as the removal from improvement status of any LEA that makes AYP for two consecutive years, regardless of the years involved.

Discussion: The Secretary believes that the absence of any reference to 2001–2002 assessment results in the otherwise very specific transition provisions of the new law, combined with the strong likelihood that many States would not be able to make these results available to LEAs prior to the beginning of the 2002–2003 school year, supports a flexible approach to the use of those results for identification purposes during the transition to the new law. To avoid any confusion about the use of 2001–2002 assessment results in subsequent years, however, the Secretary has added language clarifying that an SEA decision not to identify for improvement an LEA that, on the basis of 2001–2002 assessment data, does not make AYP for a second consecutive year, does not permit the SEA to ignore that failure in making future identification decisions.

Changes: Section 200.50(d)(3)(ii) clarifies that if an SEA chooses not to identify for improvement a school that, on the basis of 2001–2002 assessment results, does not make AYP for a second consecutive year, it nevertheless must consider the LEA's 2001–2002 performance as the first year of not making AYP for the purpose of subsequent identification decisions.

Comment: One commenter objected to the flexibility provided SEAs in proposed § 200.50(e)(3) to remove from corrective action an LEA that, on the basis of assessments administered during the 2001–2002 school year, makes AYP for a second consecutive year. The commenter maintained that the ESEA requires SEAs to remove LEAs from corrective action in such cases, as well as to use 2001–2002 assessment data to identify additional LEAs for corrective action.

Discussion: The Secretary believes that the proposed regulations are an appropriate way to address an inequity in the statutory transition provisions covering identification for corrective action. These provisions require SEAs to treat LEAs that were identified for corrective prior to enactment of the NCLB Act as subject to corrective action for the 2002–2003 school year. Some of these LEAs, however, may have made AYP in both 2000–2001 and 2001–2002, thus meeting the statutory requirement for removal from corrective action. The proposed regulations thus permit SEAs to remove these LEAs from corrective action, but does not require such removal because some SEAs may, in part due to the uncertain timing of assessment results, prefer to simply adhere to the statutory transition provisions. As for identifying additional LEAs for corrective action on the basis of 2001–2002 assessment data, proposed § 200.50(e)(1) already permits an SEA to take corrective action against any LEA that it has identified for improvement, but the statutory transition provisions suggest that mandatory identification for corrective action in the 2002–2003 school year is limited to those LEAs identified under the previous law.

Changes: None.

Section 200.51 Notice of SEA Action

Comment: Two commenters requested clarification on whether SEAs, rather than communicating directly to parents as required by proposed § 200.51(a)(2)(i), are permitted to work with the LEA to deliver information about the LEA review and improvement process directly to parents.

Discussion: The Secretary agrees that it may be more effective for SEAs, in cases where an SEA does not have access to individual student addresses, to communicate with parents through means provided by the LEA.

Changes: Section 200.51(a)(2)(i) has been changed to permit an SEA, in cases where an SEA does not have access to individual student addresses, to provide information on the LEA review and improvement process by using LEA- and school-level delivery mechanisms.

Section 200.54 Rights of School and School District Employees

Comment: Numerous commenters objected to proposed § 200.54, which would have given LEAs greater flexibility in negotiating collective bargaining agreements and other agreements between employers and employees that are consistent with the school and LEA improvement requirements of proposed §§ 200.30 through 200.53. Commenters maintained that the proposed regulations were inconsistent with both the statute and with many State and local laws governing collective bargaining agreements.

Discussion: The Secretary believes that section 1116(d) of the ESEA was not intended to deny LEA and school leaders the management tools needed to implement effective LEA and school improvement measures, which may often involve changes in the assignment and duties of LEA and school personnel. However, the Secretary agrees that the proposed regulations arguably were inconsistent with a strict reading of the NCLB Act and may have conflicted with applicable State and local laws.

Changes: Proposed § 200.54 has been removed from the final regulations.

Qualifications of Teachers and Paraprofessionals

Section 200.55 Qualifications of Teachers

Comment: Several commenters asked for clarification as to which subjects are ''core academic subjects.'' One commenter asked that foreign languages and the arts be excluded from the definition of core academic subjects. One commenter asked why science was listed as a stand-alone discipline when social studies was broken down into civics, geography, and history. Another commenter asked why special education was not listed as a core academic area.

Discussion: The definition of core academic subjects is in section 9101(11) of the ESEA, and is repeated in § 200.55(c) of the regulations. The statute defines core academic subjects as English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography. Hence, the definition lists science generally but civics, geography, and history separately. The statute does not identify special education as a core academic subject, and the Secretary lacks authority to delete or change the subjects included in this statutory definition.

Changes: None.

Comment: A commenter recommended that newly hired Title I teachers serving private school students meet the same standards of quality as those who teach in public schools.

Discussion: We agree with this recommendation.

Changes: Section 200.55 (a)(2) and (b) has been modified to clarify that the requirements governing ''highly qualified'' teachers apply to teachers employed by an LEA with funds under part A of Title I, who teach eligible private school students, to the same extent as they apply to those who teach eligible public school students.

Comment: One commenter recommended that the regulations clarify that a teacher in a targeted assistance program is one who teaches students participating in that program.

Discussion: We believe that the existing language is clear and that no further clarification is needed.

Changes: None.

Comment: One commenter recommended that the ''highly qualified'' requirement not apply to all teachers in a school that operates a schoolwide program.

Discussion: Inherent to the concept of schoolwide programs is the elimination of any distinction between Title I and non-Title I students; that is, a schoolwide program is intended to provide an instructional program that helps all students in the school. Therefore, it would subvert the intent of schoolwide programs to have requirements that govern highly qualified teachers apply to some, but not all, teachers in a schoolwide program school.

Changes: None.

Comment: One commenter recommended that § 200.55(b)(1) clarify that the requirement that ''all teachers in the State'' be highly qualified by the end of the 2005–2006 school year applies only to public elementary and secondary school teachers, and not to others, such as private school and college teachers.

Discussion: The Secretary agrees with the comment.

Changes: Section 200.55(b) has been revised to clarify that the requirements governing highly qualified teachers apply to ''all public elementary and secondary school teachers.'' This clarification was also made in § 200.56(b)(1) and (b)(2). In addition, § 200.55(d) has been added to clarify that the requirements of the section do not apply to teachers hired by private elementary and secondary schools.

Comment: As proposed, § 200.55(b)(2) provided, as an example of teachers who do not need to meet the highly qualified requirements because they do not teach a core academic subject, ''some vocational educational teachers.'' One commenter recommended deletion of the word ''some.''

Discussion: We disagree with the comment. If a vocational education teacher teaches a core academic subject, such as applied physics, section 1119 of the ESEA requires that teacher to be highly qualified. On the other hand, if a vocational education teacher teaches only a trade, such as auto mechanics, the teacher would not need to meet these requirements since the law does not treat that area of study as a core academic subject. Hence, § 200.56(b)(2) only exempts ''some'' vocational educational teachers.

Changes: None.

Comment: A number of commenters requested clarification about how the ''highly qualified'' requirements apply to special education teachers and teachers of limited-English proficient (LEP) students. Several recommended that special education teachers be deemed to have met the ''highly qualified'' requirements that apply to other teachers if they are certified or licensed in special education and have passed an appropriate State test.

Discussion: The ESEA specifies that all teachers of core academic subjects are to meet the requirements set forth in the statute. Students with limited English proficiency or with disabilities are expected to meet the same standards as all other students, and their teachers should be expected to have met the same standards for content knowledge. On the other hand, special educators who do not directly instruct students on any core academic subject or who provide only consultation to highly qualified teachers of core academic subjects in adapting curricula, using

behavioral supports and interventions, and selecting appropriate accommodations do not need to meet the same ''highly qualified'' subject-matter competency requirements that apply under the NCLB Act to teachers of core academic subjects. SEAs and LEAs must ensure that all special education personnel, including related services providers, meet the personnel-standards requirements of section 612(a)(15) of the IDEA and 34 CFR § 300.136. Special education teachers who are providing instruction in core academic subjects also must meet the ''highly qualified'' requirements of the ESEA.

The Secretary recognizes that there is an urgent need for highly qualified teachers, and that critical shortages exist in some areas, particularly math and science teachers, and special education teachers. Nevertheless, the NCLB Act sets high standards for students, as well as teachers, and states should work to meet them. The statute provides a certain amount of flexibility in how the standards are met. Teachers can demonstrate competency by taking a test, and States have flexibility to tailor those tests to the subjects taught by teachers, including special education teachers and teachers of LEP students. This issue will be addressed further in guidance.

Changes: None.

Section 200.56 Definition of ''Highly Qualified Teacher''

Comment: Several commenters recommended tightening the requirements for teachers in alternative route programs so that these individuals receive, as quickly as possible, the training and full State certification they need to be effective teachers.

Discussion: We agree with the comment. Our proposal that a teacher in an alternative route program be considered highly qualified if the teacher ''is making satisfactory progress toward full certification as prescribed by the State and the program'' reflects the need for States to ensure that alternative routes to certification do not become vehicles for granting long-term waivers of certification requirements. Still, we understand that, for these teachers to be effective, those in alternative route programs need to be prepared to teach their students from the moment they step into their classrooms, and receive the follow-up support they need as beginning teachers. We also believe that, in order to ensure that alternative route programs do not become long-term vehicles for waiving State requirements for full certification, it is reasonable to establish a maximum period—three years—in which a teacher in an alternative route can be considered to be fully certified without having received State certification.

Changes: Section 200.56(a)(1)(iii)(B) is amended by adding language that requires teachers in alternate route programs to (1) receive high-quality professional development that is sustained, intensive, and classroom-focused in order to have a positive and lasting impact on classroom instruction, before and while teaching, (2) participate in a program of intensive supervision that consists of structured guidance and regular ongoing support for teachers or a teacher mentoring program, (3) assume functions as a teacher only for a specified period of time not to exceed three years before receiving full State certification, and (4) demonstrate satisfactory progress toward full certification as prescribed by the State. The regulations have been further amended by requiring that the State ensure, through its certification and licensure process, that these provisions are met.

Comment: A commenter recommended deleting the proposed language that would permit teachers in alternative route programs to be deemed to have obtained full State certification for purposes of meeting the requirements governing highly qualified teachers. Several other commenters expressed support for the Department's proposal.

Discussion: We do not agree with those commenters who wish to delete the flexibility that we would provide LEAs for teachers in alternative routes to certification. First, Congress has chosen both to authorize and fund two alternative route programs, Troops-to-Teachers and Transition to Teaching, in Title II, part C of the ESEA, and has permitted States and LEAs to use Title II, part A formula grant funds to hire teachers in alternative route programs. Hence, we do not believe that Congress intended that teachers in alternative route program would be unable to teach until they had obtained full State certification. Beyond this, we believe that LEAs can and should be able to continue to effectively use alternate routes to certification as a mechanism for increasing the number of teachers who are capable of providing effective instruction, and, indeed that these alternative routes can also serve as models for the certification system as a whole.

Changes: None.

Comment: A commenter recommended that teachers participating in alternative certification programs be required to demonstrate subject matter competency.

Discussion: Sections 9101(23)(B) and (C) of the ESEA, and § 200.56(b) and (c) of the regulations already require this.

Changes: None.

Comment: A commenter requested that the regulations clarify that current teachers may demonstrate their subject area competency in the same ways as new teachers can, or through a state-established system of evaluation as section 9101(23)(c)(ii) of the ESEA permits.

Discussion: Section 200.56(c)(2) already provides this clarification.

Changes: None.

Comment: One commenter recommended that teachers be allowed to demonstrate subject-matter competency needed to be highly qualified on the basis of a minor in an academic area. Another commenter requested that where an evaluation of teacher performance is used to demonstrate competency, LEAs, rather than SEAs, be allowed to determine the standard of evaluation.

Discussion: We disagree with both recommendations. Section 9101(b)(ii) of the ESEA permits middle and secondary school teachers to demonstrate subject-matter competency by successful completion, in each academic subject the teacher teaches, of an academic major or coursework equivalent to an academic major (or a graduate degree or advanced certification or recredentialing). The law does not authorize receipt of a minor in the subject being taught as sufficient to demonstrate competency. Similarly, section 9101(23)(c)(ii) of the ESEA expressly permits the demonstration of subject-matter competency to be based on ''a high objective State standard of evaluation,'' not a ''local standard'' of evaluation. Moreover, the Secretary lacks authority to delete or change the aspects of this statutory definition.

Changes: None.

Comment: Section 9101(23(A)(ii)) of the ESEA, like § 200.56(B)(3), provides that to be highly qualified a teacher may not have had ''certification or licensure requirements waived on an emergency, temporary, or provisional basis.'' One commenter recommended that the terms temporary, emergency, and provisional licensure be defined.

Discussion: State certification and licensure is a matter of State law and policy, and hence the definition of these terms is left to State decisionmaking. We do not believe that attempting to establish a common definition of these terms is needed. We add only that with one exception the Secretary interprets the phrase ''waived on an emergency,

provisional, or temporary basis,'' to encompass any form of a waiver, by whatever name a State uses, under which the State permits a teacher to teach without having obtained full certification or licensure applicable to the years of experience the teacher possesses. That exception is for teachers in alternative routes to certification consistent with § 200.56(a)(2)(ii).

Change: None.

Comment: One commenter requested that all of the highly qualified teacher provisions apply to charter school teachers.

Discussion: Section 9101(23)(A)(i) of the ESEA provides that, for teachers of public charter schools, obtaining full State certification (or passing the State teacher licensing examination and holding a license to teach) means that teachers have met the requirements of their State charter school laws. Thus, the certification and licensure requirements of the ESEA do not apply to charter school teachers if State law exempts charter school teachers from these requirements. The statute's definition of highly qualified teachers provides no other exceptions for charter school teachers.

Changes: None.

Comment: One commenter recommended that, as part of the definition of highly qualified, all teachers be required to complete an approved educator preparation program.

Discussion: We assume that the comment was meant to apply to teachers progressing through alternate routes to certification. The Secretary agrees that proposed § 200.56(a)(1)(iii)(B) should be modified to include a requirement that teachers in alternative route programs receive high-quality professional development before beginning to teach. However, the Secretary does not believe that those progressing through alternative routes to teaching should need to complete a State ''approved educator preparation program,'' particularly since this kind of requirement would very likely discourage a great many talented individuals who would want to change careers and become teachers from ever doing so.

Changes: § 200.56(a)(2)(ii)(A) now contains language that requires teachers in alternative route programs to receive rigorous training before assuming instructional duties and to participate in a teacher mentoring program.

Comment: One commenter requested that the language in paragraph (b)(1) be revised to require teachers new to the profession either to hold a Bachelor's degree or, for those in teacher preparation programs, to have completed all of the requirements for the degree with the exception of student teaching.

Discussion: Sections 9101(23)(B)(i)(I), 9101(23)(B)(ii), and 9101(23)(C)(i) of the ESEA expressly require all teachers to hold a Bachelor's degree in order to be considered highly qualified. The Secretary lacks authority to delete or change the subjects included in this statutory definition.

Changes: None.

Comment: A commenter requested clarification of the terms ''advanced certification or credentialing.''

Discussion: The NCLB Act offers these vehicles as alternative means by which middle and high school teachers not new to the profession may demonstrate subject matter competency in the subjects they teach. Each State may define these terms, and establish policies that implement them, as it believes will meet the purpose of the law—to enable teachers to demonstrate subject matter competency.

Changes: None.

Section 200.57 Plans to Increase Teacher Quality

Comment: One commenter recommended that the regulations should require the State to outline specific steps for carrying out the highly qualified teacher provision, and how the State intends to monitor LEAs in this regard.

Discussion: The Secretary agrees with this recommendation.

Changes: Section 200.57(a) has been amended to require that the State's plan describe the strategies the state will use to help LEAs and schools have all teachers meet the highly qualified requirements no later than the end of the 2005–2006 school year, and to monitor the progress of LEAs and schools in meeting these requirements.

Comment: One commenter recommended that the regulations include the statutory references to the ''parents right to know'' provision.

Discussion: The Secretary believes that it is critical that parents be kept well informed on the status of their child's education, and so he agrees with this recommendation.

Changes: A new section, § 200.61, has been added that restates the language on a ''parent's right to know,'' as stated in section 1111(h)(6) of the NCLB Act.

Comment: A commenter recommended that the regulations clarify that State plans to increase teacher quality must indicate both the steps States will take to ensure that minority students have equal access to high quality teachers, and how the States will measure their progress in meeting this requirement.

Discussion: The Secretary agrees with this recommendation. Including this information in the State plan merely ensures that, through the plan, the SEA is ensuring that LEAs implement the assurance they provide the State in section 1111(c)(1)(L) of the ESEA that they ''ensure, through incentives for voluntary transfers, the provision of professional development, recruitment programs, or other effective strategies, that low-income students and minority students are not taught at higher rates than other students by unqualified, out-of-field, or inexperienced teachers.'' Indeed, given this LEA assurance, the Secretary also believes that comparable information should be included in the local plan to increase teacher quality.

Changes: Section 200.57(a) has been amended to require that the SEA take specific steps to ensure that Title I schools provide instruction by highly qualified teachers, including steps to ensure that poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers. SEAs must evaluate and publicly report their progress with respect to these steps.

Section 200.58 Qualifications of Paraprofessionals

Comment: One commenter asked that the regulations clarify that it is the paraprofessional's choice as to which of the three allowable options (two years of study at an institute of higher education, an associate's degree, or demonstrating knowledge and ability to assist in instruction through an assessment) the paraprofessional will meet. The commenter also recommends that the regulations clarify that once a paraprofessional has met qualification requirements in one district, he or she does not have to re-qualify after moving to another school district.

Discussion: The Secretary does not believe a change in the regulations is necessary. Any needed clarifications will be addressed in future nonregulatory guidance.

Changes: None.

Comment: Several commenters asked for greater clarification about which paraprofessionals must meet the requirements in § 200.58. One commenter requested that the regulations be revised to clarify that the requirements apply only to paraprofessionals hired by the school district or school. Another commenter asked whether the requirements apply to paraprofessionals with non-instructional duties working in a schoolwide project school.

Discussion: The requirements of section 1119(c) of the ESEA and § 200.58 apply to individuals hired by an LEA whether individually or as part of a partnership. They do not apply to volunteers or other paraprofessionals who may be employed by a private contractor. They also do not apply to individuals with solely non-instructional roles in schoolwide project schools.

Changes: Section 200.58(a)(1) has been amended to clarify that the qualification requirements apply to each paraprofessional ''who is hired by the LEA'' and who meets the other criteria set out in this section of the regulations.

Comment: Two commenters asked that the regulations be modified to provide a four-year transition period for paraprofessionals to obtain a high school diploma or the equivalent. Another commenter recommended that the regulations include a grandfather clause that would exempt paraprofessionals with ten or more years of experience from having to meet any of the qualification requirements.

Discussion: Section 1119(f) of the ESEA requires that LEAs receiving Title I, part A funds ensure that all paraprofessionals working in a program supported with Title I, part A funds, regardless of the paraprofessional's hiring date, have a high school diploma. The ESEA provides no authority for a phase-in of this requirement or to exempt paraprofessionals with ten or more years of experience from meeting this requirement.

Changes: None.

Comment: One commenter requested that the regulations be modified to permit a paraprofessional enrolled in an associate's degree program to be considered as meeting the qualification requirements through an alternative qualification process.

Discussion: The statute does not authorize paraprofessionals to meet the qualification requirements in the manner suggested.

Changes: None.

Comment: Two commenters objected to the qualification option that paraprofessionals have an associate's degree.

Discussion: An associate's degree is one of the three ways that the statute provides for paraprofessionals to demonstrate they are qualified. A paraprofessional may (1) complete two years of study at an institution of higher education, or (2) have an associate's degree, or (3) pass a state or local assessment that demonstrates knowledge of and ability to assist in the instruction of reading, writing or mathematics (or reading readiness, writing readiness, or mathematics readiness), as appropriate. The options recognize that, depending on a paraprofessional's background and experience, there is more than one way to demonstrate the appropriate competency.

Changes: None.

Comment: Several commenters sought clarification of what it means for a paraprofessional to have completed at least two years of study at an institution of higher education. One commenter asked that the regulations specify the specific number of semester hours necessary to demonstrate that a paraprofessional has completed the required two years of study. On the other hand, other commenters asked that the regulations make it clear that there is no specific number of credit hours that defines two years of study.

Discussion: The number of credit hours necessary to demonstrate that a paraprofessional has completed at least two years of study at an institution of higher education will vary by institution. Therefore, a ''one-size-fits-all'' definition would be inappropriate. Each State may choose to define, for paraprofessionals working in the State, what these two years of study encompass. If it does not do so, the policies of each institution will govern whether a paraprofessional has completed two years of study.

Changes: None.

Comment: One commenter requested that the regulations make it clear that paraprofessionals providing instructional support for teachers of eligible students attending private schools must meet the same standards as other paraprofessionals.

Discussion: The Secretary agrees with this recommendation. Paraprofessionals hired by an LEA to provide instructional support for Title I, part A teachers of eligible students attending private schools are employees of the school district and must meet the same requirements as any other paraprofessionals providing instructional support in a program supported by Title I, part A funds.

Change: Section 200.58(a)(3)(iii) is added to clarify that the qualification requirements apply to paraprofessionals hired by an LEA to provide instructional support to public school teachers providing Title I services to eligible private school students.

Comment: Several commenters sought clarification of the option that paraprofessionals may meet a rigorous standard of quality by demonstrating competency through a formal State or local academic assessment. One commenter requested clarification that the assessment does not have to be in writing. Other commenters wanted the regulations to require States and districts to develop these assessments; make clear that States or districts may adopt an existing assessment; require that assessments be available before September 2003; specify that the assessment should be made available at no cost to the paraprofessionals; and clarify that Title I, part A funds may be used to develop or purchase such assessments.

Discussion: Under the ESEA, States and LEAs have considerable flexibility in how they design and administer their assessments. The Secretary does not believe that additional regulations are necessary and intends to highlight this flexibility in future nonregulatory guidance.

Change: None.

Comment: Two commenters sought clarification on how the requirements apply to paraprofessionals hired ''on'' January 8, 2002 as opposed to those before or after that date.

Discussion: The Secretary agrees that clarification is needed.

Changes: Section 200.58(d) is amended to clarify that existing paraprofessionals are those hired on or before January 8, 2002.

Comment: Several commenters sought clarification on how the requirements apply to paraprofessionals in specified circumstances, *e.g.*, paraprofessionals with multiple roles, such as translators who also provide instructional support, paraprofessionals who provide instructional support to teachers of subjects other than core academic subjects, such as physical education, and non-instructional computer technicians.

Discussion: The ESEA is very explicit about the requirements and to whom they apply. The requirements apply to any paraprofessionals in Title I, part A programs who are assigned an instructional support duty, even as one of many assigned responsibilities, identified in section 1111(g)(2) of the ESEA and § 200.59(b). With regard to computer technicians, § 200.58(a)(2)(ii) of the regulations states that solely providing technical support for computers is a non-instructional duty.

Changes: None.

Comment: One commenter sought clarification on how the requirements apply to paraprofessionals working in a variety of pre-Kindergarten programs, such as Head Start, or pre-Kindergarten programs funded with Head Start and State pre-Kindergarten funds.

Discussion: A number of questions have been raised about how the paraprofessional qualification

requirements apply to paraprofessionals working in these pre-Kindergarten programs. The Secretary intends to address this issue in nonregulatory guidance.

Change: None.

Section 200.59 Duties of Paraprofessionals

Comment: One commenter wanted changes in the proposed § 200.59 in order to reinforce the difference between instructional and non-instructional duties.

Discussion: The Secretary agrees with the recommendation.

Changes: Section 200.59(b) is amended to read, ''A paraprofessional covered under § 200.58 may perform the following instructional support duties:'' Regardless of an employee's title, an individual hired by an LEA who does not perform instructional support duties as identified in § 200.59 is not a ''paraprofessional'' for purposes of Section 1119 of the ESEA or these regulations. Moreover, it is possible that one employee, for example, performs parental involvement that is instructional support while another employee performs parental involvement that is not instructional support. The Department intends to issue guidance to help explain that distinction.

Comment: Several commenters recommended deleting language that would specify that one-on-one tutoring must take place outside of the regular school day.

Discussion: The Secretary agrees that there may be circumstances in which tutoring could be provided during the school day at a time when a student is not receiving instruction from a teacher.

Changes: Section 200.59(b)(1) is amended to remove the language requiring one-on-one tutoring to take place outside of the regular school day.

Comment: Many commenters addressed the regulatory provisions in paragraph (c), and asked that it clarify what it means for a paraprofessional to work under the direct supervision of a teacher. For example, several commenters said that the proposed language was too prescriptive, while another proposed that the regulations require paraprofessionals to work in the same room as the teacher. One commenter sought additional clarification of what ''close and physical proximity to a teacher'' means, while still another commenter recommended deleting this language.

Discussion: This regulatory provision responds to a finding of the National Assessment of Title I that, even though the prior statute also required paraprofessionals to work under the direct supervision of a teacher, 41 percent of paraprofessionals reported that half or more of the time they spent teaching or helping to teach was on their own, without a teacher present.

Changes: None.

Participation of Eligible Children in Private Schools

Section 200.62 Responsibilities for Providing Services to Private School Children

Comment: One commenter recommended that the regulations confirm that Title I services and benefits to private school students be secular, neutral, and non-ideological.

Discussion: The Secretary concurs. Section 1120(a) of the ESEA requires that Title I services and benefits provided to eligible private school children be secular, neutral, and non ideological.

Changes: Section 200.62 incorporates the statutory language that reflects the recommended change.

Section 200.63 Consultation

Comment: One commenter recommended that the consultation topics listed in § 200.63(b) be examples of timely and meaningful consultation by the LEA rather than required topics for consultation.

Discussion: Section 1120(b)(2) of the ESEA requires that consultation by an LEA occur prior to an LEA's making any decision that affects the opportunities of private school children to participate in Title I. The Secretary believes that all of the consultation topics listed in § 200.63(b) are necessary because they affect the opportunities of private school children to participate in Title I.

Changes: None.

Comment: One commenter asked that § 200.63(b)(5), concerning an LEA's responsibility for assessing services to private school children, be clarified by adding a reference to the LEA's assessment responsibility under § 200.10.

Discussion: The Secretary concurs that a reference to § 200.10 clarifies the LEA's assessment responsibility.

Changes: Section 200.63(b)(5) contains a reference to § 200.10.

Comment: One commenter recommended that § 200.63(b)(6), concerning size and scope of equitable services, be clarified by including a reference to § 200.64, that addresses factors for determining equitable participation of private school children.

Discussion: The Secretary agrees that a reference to § 200.64 clarifies an LEA's responsibility to consider the factors listed in that section when determining equitable participation for private school students.

Changes: Section 200.63(b)(6) contains a reference to § 200.64.

Comment: One commenter suggested that § 200.63(b)(7) singles out one method for determining poverty data for private school children, and asked that the words ''including whether the LEA will extrapolate data from a survey'' be deleted.

Discussion: Section 1120(c) of the ESEA lists four ways an LEA may determine the number of private school children from low-income families. The Secretary's intent is to give direction for consultation rather than to indicate a preference for any method.

Changes: To make the intent clear, § 200.63(b)(7) has been amended to clarify that consultation regarding the source of poverty data for private school children must include a discussion of extrapolation only if a survey is used.

Comment: One commenter recommended that the SEA be allowed flexibility in implementing § 200.63(e)(1), that outlines the records an LEA must maintain and submit to the SEA when documenting that it has consulted with private school officials.

Discussion: The Secretary believes that the language in § 200.63(e) accurately reflects the statute and gives an SEA the flexibility needed to implement provisions of this section.

Changes: None.

Comment: One commenter requested that § 200.63(e)(2), that requires an LEA to report to the SEA that it has consulted private school representatives, be amended by adding a provision requiring that an LEA indicate the reason why the private school officials did not provide affirmation.

Discussion: The Secretary believes that the proposed regulations accurately reflect the NCLB Act. The Secretary assumes, and would encourage, that any documentation that an LEA provides to the SEA concerning its consultation with private school officials would include an explanation about why private school officials did not provide the requisite affirmation.

Changes: None.

Section 200.64 Factors for Determining Equitable Participation of Private School Children

Comment: One commenter asked that the clause ''In the aggregate,'' at the beginning of § 200.64(a)(1), concerning equal expenditures, be deleted.

Discussion: The Secretary concurs and believes that this clause was

included in error. This same clause is contained elsewhere in § 200.64(a)(1).

Changes: Section 200.64(a)(1) has been amended to remove ''In the aggregate.''

Comment: One commenter stated that the language concerning equal expenditures lacks specificity and could result in confusion. The equitable services requirements would not apply to all of the district-wide activities for which an LEA must reserve funds under § 200.77. For example, an LEA would not need to ensure that private school students receive equitable services from funds reserved to meet transportation costs related to public school choice or to provide supplemental services to students in public schools identified as in need of improvement. The commenter asked that § 200.64(a)(2) be changed to make clear that the equitable services requirement applies only to reserved funds that affect services to private school students. Another commenter stated that funds reserved under § 200.77 are not limited to instructional activities, and that § 200.64(a)(2) should not limit the use of the funds only to ''instructional activities.'' In order to be consistent with the language in § 200.77, the commenter recommended the use of the more inclusive word ''services.''

Discussion: The Secretary agrees that, where applicable, funds an LEA reserves under § 200.77 must be used to provide equitable services for private school children. An LEA must also, when reserving funds under § 200.77, ensure that it provides instructional and related activities for eligible private school children that are equitable to activities provided for public elementary or secondary school students.

Changes: Section 200.64(a)(2)(i)(A) is amended to make clear that an LEA must provide equitable services to private school students from funds it reserves off the top of its allocation if those funds are used to provide instructional and related activities to public elementary and secondary school students.

Comment: One commenter recommended that § 200.64(a)(2)(i) be changed to specify that the equitable services an LEA must provide include ''necessary educational support such as technology and interpreters''.

Discussion: The needs of the private school participants determine what Title I services an LEA provides. Technology and interpreters are two of many Title I service options available, but may not be what is required in all instances.

Change: None.

Comment: One commenter stated the language in § 200.64(a)(2)(i), concerning district-level funds reserved for student instructional and related activities, is confusing with regard to how an LEA provides equitable services to private school children from Title I funds reserved by the LEA for district-wide activities. The commenter believes that equitable services should be based on a comparison to services and benefits provided to public school students rather than on the proportion to the number of private school children from low-income families residing in participating attendance areas.

Discussion: The Secretary believes that, in order to ensure that private school children receive an equitable share of services from funds an LEA reserves under § 200.77, the amount of funds made available from that reserve for equitable services must be proportionate to the number of private school children from low-income families residing in participating attendance areas. The Secretary agrees that this regulatory language needs to be modified in order to make this policy clearer.

Changes: The Secretary has amended proposed § 200.62(a)(2)(i)(B) to clarify that equitable services must be proportionate to the number of private school children from low-income families residing in participating public school attendance areas.

Comment: None.

Discussion: In giving further consideration to the proposed regulations, Departmental staff determined that § 200.64(b)(2)(iii)(B) needed further clarification concerning the need for private school participants to meet the State's student academic performance standards. Because a private school's curriculum may not be aligned with State standards, it may be inappropriate to expect private school participants to meet the same State standards. The Secretary is making a clarifying change to give an LEA the flexibility to use equivalent standards to measure the academic progress of private school participants.

Changes: The Secretary has made this change.

Comment: One commenter recommended a technical correction in § 200.64(b)(3)(i), concerning an LEA's choice to provide services to private school children either directly or through a third-party contractor, to replace the word ''must'' with the word ''may'' and thereby make the language consistent with the statute.

Discussion: The Secretary concurs with this change.

Changes: Section 200.64(b)(3)(i) has been amended to make clear that an LEA may provide equitable services either directly or through a third-party provider.

Comment: One commenter suggested that § 200.64(b)(3)(ii) of the regulations be clarified so that, if an LEA provides services through a contract with a third-party provider, the contractor must be independent of the private school and of any religious organization.

Discussion: The Secretary agrees with the recommended change. Section 1120(c)(2)(B) of the ESEA requires that a third-party provider who provides equitable services to private school students must be independent of the private school and of any religious organization and that the contractor be under the control and supervision of the LEA.

Changes: The Secretary has amended § 200.64(b)(3)(ii) to include the statutory language.

Comment: One commenter suggested that § 200.64(b)(4) be changed to clarify that timely and meaningful consultation with private school officials must take place in accordance with § 200.63 before an LEA makes final decisions with respect to providing Title I services to eligible private school children.

Discussion: The Secretary agrees that an LEA must make final decisions with respect to the services it will provide to eligible private school children only after timely and meaningful consultation with private school officials in accordance with § 200.63.

Changes: Section 200.64(b)(4) has been amended to reflect the recommended clarification.

Section 200.65 Determining Equitable Participation of Teachers and Families of Participating Private School Children

Comment: A commenter recommended clarifying § 200.65(a)(1), concerning the reservation of funds for parent involvement and professional development activities, by inserting the word ''applicable'' before ''funds''.

Discussion: The Secretary agrees with this recommendation because the equitable services requirements apply to most, but not all, funds reserved for professional development and parent involvement activities. For example, equitable services for private school teachers would not apply to professional development funds an LEA in improvement must reserve in order to improve the quality of its schools.

Changes: The Secretary has made this change.

Comment: A commenter recommended that § 200.65(a)(1) be changed so that an LEA must ensure

that ''pupil services personnel,'' in addition to teachers who provide services to private school children, be involved in professional development on an equitable basis.

Discussion: The requirement for equitable services in section 1120(a) of the ESEA applies to private school teachers of students participating in Title I to improve the achievement of those students. To the extent that ''pupil services personnel'' are involved with improving the achievement of participating private school students, they may participate in professional development activities under Title I.

Changes: None.

Comment: One commenter did not agree that the amount of funds an LEA must make available under § 200.65(a)(1) to ensure equitable services to private school children must be based on the proportion of private school children from low-income families residing in participating school attendance areas. The commenter believed that the measure of service equity is more appropriately based on the services provided to the teachers and parents of private school students compared to services provided to teachers and parents of public school students.

Discussion: The Secretary believes that the best way to ensure that the equitable participation of teachers and families of participating private school children occurs is to base the amount available for those services from the applicable reserve on the proportion of private school children from low-income families residing in participating public school attendance areas. To make this policy more clear, the Secretary has made a clarifying amendment.

Change: The Secretary has amended § 200.65(a)(2) to clarify that the amount of funds available to provide equitable services from reserved funds for parent involvement and professional development must be proportionate to the number of private school children from low-income families residing in participating public school attendance areas.

Allocations to LEAs

Section 200.70 Allocation of Funds to LEA in General

Comment: One commenter recommended clarifying the references to total population used for determining whether an LEA is a small or large LEA in § 200.70(c) and (d) to indicate that this means total census population.

Discussion: The language in the proposed regulations is consistent with the statutory language in section 1124(a)(2)(B)(vi)(II) of the ESEA, which defines a small LEA as one with a total population of less than 20,000. However, the Secretary, in fact, provides States with data from the Census Bureau on the total resident population for each LEA in order for the SEA to identify large and small LEAs for the purpose of redistributing Title I, Part A funds among its small LEAs using alternative poverty data. We agree that the commenter's recommendation adds clarity. Such a change will make the regulations consistent with the Department's current practice of providing States with total census population data for each LEA.

Changes: The Secretary has changed the ''total population'' references in §§ 200.70(c) and (d) and 200.74(a) to ''total census population''.

Comment: One commenter asked what was meant by the term ''limited instances'' used in the preamble to the proposed regulations, which stated that § 200.70 establishes the principle that an SEA must change the allocations determined by the Department in limited instances.

Discussion: As a general rule, the Department of Education determines allocations for LEAs. Sections 200.70 through 200.75 outline the specific, limited instances when an SEA must adjust the allocations determined by the Department. For example, the list of LEAs that the Secretary uses to determine LEA allocations is provided by the Census Bureau and is based on the geographic boundaries of LEAs as they existed several years ago. Because that list does not match the current universe of LEAs in many States, SEAs must adjust the Department's LEA allocations to account for school district consolidations, break-ups, and boundary changes and to account for the creation of new LEAs (such as charter school LEAs) that are legitimately eligible for Title I, part A funds. In addition, SEAs must adjust the Department's allocations to (1) reserve funds for school improvement, State administration, and the State academic achievement awards program; and (2) allow, in certain cases, for the use of alternative poverty data to redistribute Department-determined Title I allocations among districts with fewer than 20,000 total residents.

Changes: None.

Section 200.72 Procedures for Adjusting Allocations Determined by the Secretary To Account for Eligible LEAs not on the Census List

Comment: One commenter recommended that this section be revised to require that an SEA provide final allocations to LEAs no later than 60 days following the receipt of the final allocation notification from the Department.

Discussion: While the Secretary supports the need for SEAs to determine final allocations as quickly as possible, it is sometimes impossible for an SEA with a significant number of newly created or expanding charter school LEAs to make final allocations within the 60 day deadline recommended by the commenter. In many cases the poverty and enrollment data for the charter school LEAs and the districts from which they draw their students are not available until the beginning of the school year. The data available at the beginning of the school year are often estimates, which the SEA uses to determine preliminary allocations. The SEA must adjust these allocations later in the school year after it receives actual data in order to determine final LEA allocations.

Changes: None.

Section 200.73 Applicable Hold-Harmless Provisions

Comment: One commenter believed that the language of this section implied that an LEA must meet the eligibility requirements for three of the four Title I, part A formulas in order to benefit from the hold-harmless protection.

Discussion: For the Basic, Targeted, and Education Finance Incentive Grant formulas, § 200.73(d)(1) requires that an LEA be eligible under each of those formulas in order for the applicable hold-harmless provision to apply.

Changes: The Secretary has amended the language in § 200.73(d)(1) to clarify that, to benefit from the hold-harmless provision under a particular formula, an LEA need only be eligible under that formula.

Section 200.75 Special Procedures for Allocating Concentration Grant Funds to Small States

Comment: One commenter raised a concern whether the Concentration Grant hold-harmless provision applies to the special procedures that a small State may use in allocating those funds to LEAs.

Discussion: The Concentration Grant hold-harmless provision described in § 200.73(d)(2) applies to LEAs in all States. Therefore, an SEA must pay an LEA not meeting the eligibility thresholds for Concentration Grants its hold-harmless amount for four consecutive years. This hold-harmless provision applies to a small State that uses the flexibility available to it under section 1124A(d) of the ESEA and

§ 200.75 of the regulations when allocating Concentration Grant funds to eligible LEAs in which the number or percentage of formula children equals or exceeds the Statewide average number or percentage of those children.

Changes: The Secretary has added a reference § 200.75(a)(2)(ii) to make clear that the Concentration Grant hold-harmless provision in § 200.73(d) applies to small States using the special procedures outlined in § 200.75.

Procedures for the Within-District Allocation of LEA Program Funds

Section 200.77 Reservation of Funds by an LEA

Comment: One commenter asked why there is a provision regarding reserving funds for capital expenses since there are no funds appropriated for the Capital Expenses program and the authorization for that program will expire on September 30, 2003.

Discussion: Section 200.77(f) of the regulations continues the authority for an LEA reserve Title I funds that are reasonable and necessary to administer programs for public and private school children. An LEA may still use Title I funds it reserves for administration to pay for capital expenses associated with providing services to private school children even though Congress has appropriated no funds specifically for capital expenses in fiscal year 2002 and the authorization, which governs the use of funds appropriated for the program will expire on September 30, 2003.

Changes: None.

Comment: One person commented that an LEA should have the flexibility to meet the reserve requirements for professional development in §§ 200.52(a)(3)(iii) and 200.60 from non-Title I funds and asked whether the parental involvement reserve can be met from non-Title I funds.

Discussion: In all three instances, the Title I statute requires that these reserve requirements be met from Title I funds received by the LEA.

Change: None.

Section 200.78 Allocation of Funds to School Attendance Areas and Schools

Comment: One commenter recommended amending the language in § 200.78(a)(2)(ii)(B)(*1*) related to obtaining a poverty count of children in private schools through a survey to make it consistent with the statute.

Discussion: In obtaining a count of private school children from low-income families for within-district Title I, part A allocation purposes, the regulations provide that an LEA could, instead of using the same poverty data it uses to count public school children, use comparable poverty data from a different source such as a private school survey so long as that survey protects the identity of families of private school children. In order to be consistent with the language in the statute, the Secretary agrees with the language change in § 200.78(a)(2)(ii)(B)(*1*) that the commenter suggests. However, in order to provide LEAs with the greatest flexibility possible in obtaining poverty data for students attending private schools, the Secretary is adding language that enables an LEA to use comparable poverty data from a different source such as scholarship applications.

Changes: The Secretary has made the suggested change and added further clarifying language noted in the discussion by adding a new paragraph (a)(2)(ii)(C) to § 200.78.

Comment: One commenter recommended changing the language in § 200.78(a)(2)(iv) to make it consistent with the provisions in § 200.63 that address district consultation with private school officials and reference § 200.78. The commenter believed this change would make clearer that an LEA has the final authority to determine the method used to calculate the number of private school children from low-income families for Title I allocation purposes only after the LEA has engaged in timely and meaningful consultation with private school officials.

Discussion: The Secretary agrees that the commenter's proposed change makes it clearer that an LEA must engage in timely and meaningful consultations with local private school officials before making a final decision about the method it will use to determine the number of private school children from low-income families who reside in participating public school attendance areas. The change would also make this provision consistent with the requirements in § 200.63.

Changes: The Secretary has modified § 200.78(a)(2)(iv) to make clear that an LEA must consult with appropriate private school officials about the method of collection of poverty data.

Fiscal Requirements

Section 200.79 Exclusion of Supplemental State and Local Funds From Supplement, Not Supplant and Comparability Determinations

Comment: One commenter asked for clarification, in either the regulations or guidance, to indicate that the use of Title I funds to pay for substantial increases in transportation costs of an LEA directly attributable to the public school choice provisions of section 1116 of the ESEA do not violate supplement, not supplant or comparability provisions. Another commenter asked whether an LEA could combine State and local funds with Title I, part A funds to pay for transportation costs associated with implementing the public school choice provision in section 1116 of the ESEA. If an LEA can combine State and local funds with Title I funds for transportation costs, the commenter further asked whether an LEA will be in compliance with the supplement, not supplant requirement even though it is using Title I funds to supplement local funds for transportation.

Discussion: The Secretary will address this issue in guidance. Generally, however, an LEA must first determine what its transportation costs would be in the absence of Title I. Additional transportation costs attributable to the public choice provision of section 1116 of ESEA may be met with Title I, part A funds.

Changes: None.

Subpart C—Migrant Education Program

Section 200.82 Use of Program Funds for Unique Program Function Costs

Comment: One commenter recommended adding in § 200.82(e) the term ''MEP'' to clarify that the comprehensive State plan is for the delivery of MEP services.

Discussion: The Secretary agrees with the suggested editorial change.

Change: Section 200.82(e) has been amended to refer to a ''comprehensive State plan for MEP service delivery.''

Comment: Three commenters recommended adding several additional items to the list of examples in § 200.82 of ''other administrative activities * * * unique to the MEP'' for which an SEA may expend MEP funds that it does not reserve for general administration. The commenters recommended adding one or more of the following activities: parent advisory council activities; advocacy and outreach activities for migratory children and their families; planning, operation and evaluation of program effectiveness; and services to migratory children who are failing, or most at risk of failing, to meet the State's academic standards and whose parents do not have a high school diploma or its recognized equivalent or who have low levels of literacy.

Discussion: The Secretary agrees that, under the statute, MEP funds can be expended for all of these activities. However, the Secretary does not agree that each of these activities constitutes

the other administrative activities unique to the MEP, or activities that are the same or similar to administrative activities that LEAs perform under Title I, part A, for which MEP funds not reserved for general administration may be expended under § 200.82. Of the commenters' suggestions, the Secretary believes that activities associated with an SEA's establishment and operation of a State parent advisory council, and its evaluation of the effectiveness of the State MEP are the appropriate additional examples of those other administrative activities that are the subject of § 200.82.

Change: Section 200.82(g) and (h) has been added to clarify that the establishment and implementation of a State parent advisory committee and the evaluation of the effectiveness of the State MEP are additional examples of other administrative activities, unique to the MEP, or are the same or similar to administrative activities that LEAs perform under Title I, part A for which an SEA may expend MEP funds that are not reserved for general administration.

Section 200.83 Responsibilities of SEAs To Implement Projects Through a Comprehensive Needs Assessment and a Comprehensive State Plan for Service Delivery

Comment: None.

Discussion: In giving further consideration to the proposed regulations, Departmental staff determined that § 200.83(a)(3)(ii) refers to the ''general educational needs of migratory children'' that must be addressed by an SEA's MEP service delivery plan, while § 200.83(a)(2)(ii) refers to the ''other needs of migratory children'' that are to be identified in an SEA's needs assessment. Given that both references are intended to refer to the same needs, and that section 1306(a) of the ESEA provides that these needs are to be ''special educational needs of migratory children,'' the Secretary believes that it is desirable to improve the clarity of both of these regulations so that they reflect special educational needs that an SEA's needs assessment must address.

Change: The ''special educational needs'' of migratory children that are identified and addressed through the SEA's comprehensive needs assessment and State plan for service delivery are those identified in section 1306(b)(1) of the ESEA, *i.e.*, (1) unique needs arising from these children's migratory lifestyle, and (2) those needs that must be addressed in order to permit these children to participate effectively in school. Section 200.83(a)(2)(i) and (a)(3)(i) already provide that the SEA's needs assessment and service delivery must address the unique needs arising from migratory lifestyle. Section 200.83(a)(2)(ii) and (a)(3)(ii) have been revised to clarify that the needs assessment and service delivery also must address other needs of migratory children that must be met in order for these children to participate effectively in school.

Comment: One commenter recommended the inclusion of additional, detailed requirements and examples for carrying out parental consultation under § 200.83(b). The commenter proposed adding language to this paragraph to require that this consultation include (1) interpreter services; (2) notices to parents in a language that the parents can understand; taking into account language proficiency and literacy levels; (3) the use of non-traditional communications vehicles, such as posting notices at churches and other social service facilities; and (4) the establishment of networks with other care-givers who serve the population of migratory workers. The commenter stated that providing these examples of communication strategies would help ensure more effective communications with the families of migratory children.

Discussion: Section 200.83(b) requires an SEA to develop its MEP service delivery plan in consultation with parents. The Secretary believes that this level of detail is more appropriate for nonregulatory guidance. However, the Secretary does agree that, consistent with § 1304(c)(3)(B) of the ESEA, § 200.83(b) should clarify that the required parental consultation regarding the SEA's MEP service delivery plan must be through a format and language that parents understand.

Change: Section 200.83(b) has been amended to note that consultation shall be in a format and language that parents understand.

Section 200.84 Responsibilities of SEAs for Evaluating the Effectiveness of the MEP

Comment: One commenter recommended amending § 200.84 to specifically include the use of alternatives to standardized testing used with other children when an SEA evaluates the effectiveness of its MEP. The commenter suggested that migratory children often cannot be assessed through standard or traditional means since standardized testing used with other children to determine overall program progress is not likely to be valid with the population of migratory children.

Discussion: The Secretary does not believe the commenter's proposed additional language to § 200.84 is needed. The Secretary believes that specific details about the methods an SEA might use for determining the effectiveness of its MEP are more appropriately presented in nonregulatory guidance.

Change: None.

Subpart D—Prevention and Intervention Programs for Children and Youth Who are Neglected, Delinquent, or At-risk of Dropping Out

Section 200.90 Program Definitions

Comment: One commenter asked that a provision be added to clarify that the supplement, not supplant requirement applies to Title I, part D, subpart 2.

Discussion: This fiscal requirement does not apply because NCLB does not specifically make the supplement, not supplant requirement applicable to programs authorized under part D, Subpart 2 of Title I.

Changes: None.

Subpart E—General Provisions

Section 200.100 Reservation of Funds for School Improvement, State Administration, and the State Academic Achievement Awards Program

Comment: One commenter stated that the $400,000 cap on the amount a small State may reserve for State administration is inadequate.

Discussion: Section 1004 of the ESEA authorizes an SEA to reserve for State administration up to one percent from funds allocated to the State under Title I, part A (Grants to LEAs), part C (Migrant Education), and part D, Subpart 1 (State Agency Neglected or Delinquent Program. The ESEA further provides that if the amount calculated as available to be reserved for State administration totals less than $400,000, an SEA may reserve up to $400,000. The Department cannot increase these limitations through regulations.

Changes: None.

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